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REPORTS
OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
MIDDLE DIVISION,
FOR THE YEAR
1870-71.

JOSEPH B. HEISKELL,
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ERRATA.

Page 29, line 1 of head note—For “does” read “*does not.*”

Page 278, line 3 from foot—For “attached” read “*attacked.*”

Page 298, line 2—For “to a person living” read “*to heirs of a living person.*”

Page 362, line 11—For “Freeman” read “*Deaderick.*”

Page 450, line 20—For “1 Head” read “*3 Head.*”

Pages 484 and 489, line 18 of each—For “2 Hay.” read “*2 Yer.*”

Page 509, line 22—For “869” read “*2869.*”

Page 535, line 14—For “vendor” read “*vendee.*”

Page 589, in running title—For “21” read “*25.*”

Page 596, line 7—For “James A.” read “*James M.*”

Page 633, line 6 from foot—For “Megis” read “*Meigs.*”

Page 640, line 1—For “313” read “*3133.*”

Page 714, line 12—For “5” read “*6.*”

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
MIDDLE DIVISION.

NASHVILLE.....DECEMBER TERM, 1870.

GABRIEL MAUPIN *v.* SAMUEL K. WHITSON.

1. SET-OFF. *Costs upon.* A defendant, pleading and sustaining a set-off is entitled to recover the costs arising upon the set off.
2. JUDGMENT. *Powers of Court over.* Judgment for costs erroneously entered upon a verdict may be corrected at a subsequent term.
3. PLEADING. Loose pleading reprehended.

FROM BEDFORD.

Appeal in error from the Circuit Court. JOHN P. STEELE, J.

W. H. WISENER, for the plaintiff.

H. S. DAVIDSON, for defendant, cited Code, 3201, 3212; *Boothe v. Cowan*, 5 Sneed, 354.

Gabriel Maupin v. Samuel K. Whitson.

TURNEY, J., delivered the opinion of the Court.

The judgment of the Circuit Court is correct.

The only question is one of taxation of costs. The plaintiff in error, who was plaintiff below, sued the defendant in the Circuit Court of Bedford county, and filed what purports to be a declaration. The defendant filed a plea of *nil debit*, and one of set-off. The jury returned a verdict, "that they find that the plaintiff has sustained damages by reason of the premises in the declaration mentioned, to the sum of one hundred and eighty-one dollars; and they further find that the plaintiff is indebted to the defendant, by way of set-off, one hundred and sixty-nine dollars and seventy-five cents, leaving a balance of eleven dollars and twenty-five cents in favor of the plaintiff."

Upon this verdict the Court pronounced judgment in favor of the plaintiff for eleven dollars and twenty-five cents, together with the costs of the cause.

At the next term of the Court the defendant moved to re-tax the costs, and showed to the Court that on the trial he had examined several witnesses in support of his set-off, thereby creating costs to the amount of \$43.86, which he asked should be stricken from the costs taxed against him, and taxed to the plaintiff. The Court entertained the motion. The action of the court is well sustained by reason and authority. The set-off was a cross action, in which the defendant was plaintiff, and in which he succeeded. Upon principle, as well as by the universal rule of courts of law, having succeeded in establishing and recovering his demand, he was entitled to re-

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cover the costs necessarily and properly accruing in making out his case.

It is insisted in argument that the correction or re-taxation should not be made because the verdict is general, and does not ascertain the items constituting the set-off.

Such is not the law; and if it were, it would be difficult to apply it in this case. Under what is called the pleadings, the declaration does not propose to be in any particular form of action, but may be denominated assumpsit, debt, trespass, trover or ejectment, as it is "for damages for property," indefinitely described as "crockery-ware, carpets, desks, chairs, stables, crops, fences," etc.

The plea of set-off is equally inartificial, the items being generally blank, and always vague and uncertain. There is nothing in the declaration or plea notifying the opposite party of what he is called on to defend. The object of pleading is wholly disregarded in both. Both ought to have been stricken out by the court, and the parties required to re-plead. The parties made such an issue as satisfied themselves, and there was a verdict. The case is not here in such shape, nor for such purpose, as to authorize this Court to disturb the pleadings now. Though they are in no part good, even under the broad and loose allowances of the Code, still they aptly illustrate the demoralization that has already grown out of the Code system of pleadings; and will further result from it, unless the Courts require those of the profession who prefer to plead under it, to adhere strictly to its requirements.

It would be better for the rights of parties, and the

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purity of the law, if we could return to the ancient way—treat pleading as a science, and the only true groundwork upon which the proper administration of the law can permanently stand.

Affirm the judgment.

KISSOM & KEELER v. BENJAMIN A. NELSON, *et als.*

1. CONVEYANCE. *Construction.* In the construction of a conveyance the intent of the parties is to prevail. Present words of conveyance in the former part of the instrument may be controlled by after portions of the same.
2. SHERIFF'S SALE. *Remainder, how levied on.* A remainder interest must be levied on and sold as such, and will not pass by a levy in general terms.

Cases cited: *Kelly v. Morgan*, 3 Yer., 437; 1 Swan, 124, 146; *Carnes v. Apperson*, 2 Sneed, 562; 9 Hum., 541.

FROM BEDFORD.

Appeal from the Circuit Court, J. W. PHILLIPS, J., presiding.

The levy mentioned in the opinion, was as follows: "Levied on a certain tract or parcel of land as the property of the said B. A. Nelson, situated in said (Bedford) county, in Civil District No. 3, and bounded as follows," (giving a full description.) The bill of exceptions shows that the death of Moses Nelson, Elizabeth Nelson, and a

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negro woman, Chloe, before the institution of this suit, was proved, but that they were alive at the time of the levy and sale.

J. L. SCUDDER and SAMUEL WHITTHORNE, for plaintiff in error.

H. L. and R. B. DAVIDSON, for defendant, insisted that the charge of the Court that Moses Nelson, by the deed, retained the legal title in himself for life, was error, citing *Caines v. Jones*, 5 Yerger, 249; *Walls v. Ward*, 2 Swan, 648; *Meredith v. Owen*, 4 Sneed, 223.

SNEED, J., delivered the opinion of the Court.

The plaintiff's right of recovery, in this action of ejectment, depends upon the proper interpretation of an instrument of writing in the words following:

"Know all men by these presents, that we, Moses Nelson, B. A. Nelson and John W. Nelson, have made and entered into the following contract and agreement, to-wit: I, the said Moses Nelson, give, grant, and convey unto the said John W. Nelson, his heirs and assigns, for the consideration of the undertaking of the said John W. Nelson as hereafter set out, and the further consideration of one dollar to me paid; the west half of the tract of land on which I live, which tract contains one hundred acres, more or less. I also give, grant and convey, unto the said B. A. Nelson, his heirs and assigns, for the consideration of the undertaking of the said B. A. Nelson, as hereafter set out, and the further consideration of one dollar to me paid, the east half

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of the said one hundred acre tract, being the same fifty acres which I conveyed to him, and by him reconveyed to me, to have and to hold the said fifty acres to each of them, their heirs and assigns forever. It is expressly understood between the parties that I, the said Moses Nelson, am to retain in my own right, the title of said land until I see proper to part with it; and I am to part with the same whenever the said John W. Nelson or B. A. Nelson, or either of them, desire to sell the fifty acres thus given and conveyed to them, provided they or either of them, make to me a bond satisfactory to me to do and perform their undertaking hereafter set out, and not until then. We, the said John W. Nelson and B. A. Nelson, covenant and agree to maintain and support, for and in consideration of the above conveyance from Moses Nelson, during their natural lives, the said Moses Nelson, Elizabeth Nelson, and an old negro woman named Chloe. We bind ourselves, heirs, executors or administrators, to furnish all and singular, the necessities that may be required for the proper comfortable support and maintenance of the said Moses Nelson, Elizabeth Nelson, and old negro woman Chloe, or either of them, at our own expense and charge, during their natural lives; and this undertaking is to be borne equally between us, each paying half of said expense; in short, the said Moses Nelson, Elizabeth Nelson and negro Chloe, are, while they or either of them live, to live at our charge and expense; and the said Moses Nelson is to part with the title to said land whenever the said John W. or B. A. Nelson wish to sell it or any part of it—and they make a bond satisfying me that

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they will honestly and faithfully carry out and perform the undertaking to maintain, support and fully provide for me and my wife, the said Elizabeth Nelson, and negro woman, as they have above set out. And I do not part with it until that is done; or, after the death of myself, my wife, and the said Chloe; in either case, the title to said land is to be fully vested in the said John W. and B. A. Nelson, respectively, their heirs and assigns forever.

“In testimony whereof, we have hereunto set our hands and seals, the 15th of July, 1859.

[Signed]

MOSES NELSON,
JOHN W. NELSON,
B. A. NELSON.”

The land in controversy is the fifty acre tract mentioned as the portion conveyed to Benj. A. Nelson as above, and was part of the grant by the State to the heirs of Daniel Vaughan, as shown in the proof. The only question necessary to be considered is the effect of the foregoing instrument upon the title, and whether Benj. A. Nelson was invested with such a legal estate in the land as was subject to execution and sale, so that the purchaser may maintain ejectment under a Sheriff's deed founded on such sale. The land lies in Bedford county, and in the Circuit Court of that county the plaintiff recovered a judgment against the defendant, B. A. Nelson, on the 2d of August, 1859. An execution was issued and levied upon the land on the 24th of May, 1860, and the same was sold as the property of B. A. Nelson and purchased by the plaintiffs, who, on

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the 30th of July, 1866, obtained a Sheriff's deed, and on that day instituted this action of ejectment. The verdict and judgment below were for the defendants, from which the plaintiffs have appealed in error.

It is unnecessary to discuss the effect of the last or closing words of the instrument in question, or whether or not the present vested legal estate in remainder thereby created, is or is not a leviable interest, out of which the plaintiffs might have realized their judgment to the extent of the value of the remainder. It is well settled that reversions and vested remainders in real estate are subject to execution sale. *Kelly v. Morgan*, 3 Yerg., 437. But the plaintiffs have chosen to treat the instrument as a conveyance of the legal estate *in presenti*, with a right of immediate possession, and thus regarding it, they have caused their execution to be levied on the land as if held in fee simple absolute by their debtor; and the Sheriff's deed founded upon such sale is their chief muniment of title. It is a doctrine of the law that the plaintiff in ejectment must be clothed with a perfect legal title in order to sustain his action, and that he must rely upon the strength of his own and not the weakness of his adversary's title. 9 Johnson R., 60; 1 Swan, 146. Is the Sheriff's deed in such a case as this, such muniment of title? We think not. The doctrine that words appropriate and purporting to convey the absolute estate, used in a deed are decisive of its construction, and are to prevail over the manifest intent of the instrument to the contrary, can not be maintained. The true rule is thus stated by this Court: "Contracts of

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every kind may be subject to conditions by which an estate or interest may commence or be enlarged or defeated. No technical words are necessary to create the condition or declare its nature. Whether the contract be upon condition precedent or subsequent, are questions to be resolved by the intention of the parties, or to be collected from a careful consideration of the entire instrument. *Carnes v. Apperson*, 2 Sneed, 562; *et vid.* 9 Hum., 541; 1 Swan, 124.

The levy and sale and Sheriff's deed, is of the whole estate, and the validity of the proceeding, as an investiture of title, can only be ascertained by a construction of the instrument. The intention of the parties is too evident to admit a question. The instrument is not technically a deed of conveyance, but a deed indented, or obligation in which there are more parties than one bound by reciprocal obligations to each other. 1 Bouv. L. D., 968. The party of the first part, Moses Nelson, was the father, and the two others, the sons. The intention to retain the legal title for the benefit of himself and wife and his old slave, Chloe, is predominant and pervading, and may be observed in almost every alternate line of the instrument. It is said that one of the parties, in whom the old man had reposed his hope of a maintenance for the declining years of the three beneficiaries, has left the country. The other had not performed the conditions of the trust, upon which the legal title was to be relinquished to him. It follows, therefore, that the defendant did not have such an estate in the land as was subject to execution at the

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time and in the manner as actually levied, nor has the plaintiff derived, under that proceeding, such a title as will enable him to maintain this action.

Judgment affirmed.

J. N. DUNNAWAY and Securities, in error, v. WILLIAM COLLIER.

1. JUDGMENT BY MOTION. *For Insufficient Return. Damages.* On motion against an officer for an insufficient return, the 12½ per cent. damages is to be computed on the amount of the execution, after adding the interest thereon to the date of the judgment by motion. Code, 3592, 3600.¹
2. SAME. *Waiver. Release of Damages.* Issue of *alias* executions, or receipts of portions of an execution, do not operate as a waiver of the right to move against an officer for an insufficient return on the original execution, nor as a release of the statutory damages.
3. Case approved, *Barnes v. White*, 2 Swan, 442; and see *Doyle v. Glenn*, 4 Hum., 309.
4. Case disapproved, *Trigg v. McDonald*, 2 Hum., 386.

FROM BEDFORD.

Writ of error to the Circuit Court of Bedford. Record here does not show what judge presided.

W. H. WISENER, for plaintiff in error.

ED. COOPER, for defendant.

DEADERICK, J., delivered the opinion of the Court.

¹See *Young v. Donaldson*, post p., —.

J. N. Dunnaway, &c., v. Wm. Collier.

Dunnaway was a Constable in Bedford county, and defendant in error placed in his hands for collection, an execution against M. P. Gentry.

The plaintiff in error not having made proper return of the execution, the defendant in error entered a motion for judgment against him in the Circuit Court of Bedford county:

1. For failure to make due and proper return of the execution.
2. For an insufficient return.
3. And also for failure to pay over money collected by him upon said execution.

The return of the officer upon the execution is simply "not satisfied." This is clearly an insufficient return, and rendered the officer liable to a motion for the default. *Alias* and *pluries* executions were subsequently issued, and after their issuance partial payments were made thereon.

For failure to return, or for an insufficient return of an execution, the Constable is liable for the amount due upon the execution, and twelve and a half per cent. damages. Code, 3594.

The amount due upon the execution, which is the process issued to enforce the satisfaction of the judgment, is the amount of the judgment for the debt, with the interest computed upon it from the day of the rendition until it is satisfied, and the costs.

When a party is entitled to have a judgment by motion against an officer, for a failure to make due and proper return, or for a false or insufficient return of an execution, the interest is computed upon the principal

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judgment from the time of its rendition, and added thereto; twelve and a half per cent. damages upon the principal and interest are then added, and judgment rendered for the aggregate sum. Code, 3594.

For the plaintiff in error it is insisted that the plaintiff below having received money collected upon the execution, has waived his right to a motion against the officer for the insufficiency of his return. In 2 Hum., 389, it was held that the receiving, from the Sheriff, by a plaintiff who had made a motion against him for a *false return*, of the amount of money the Sheriff returned he had collected, was a waiver of his motion. But in a later case, in 2 Swan, 442, wherein a motion was made against a Sheriff and his securities for an insufficient return, it is held that, if a plaintiff issue an *alias* execution, and receive a part of his judgment, it is no release of the Sheriff from the balance of the judgment and the damages given by statute, nor is it a waiver of the plaintiff's motion against him to enforce it.

It is difficult to conceive upon what principle the receiving by the plaintiff, of a portion of the judgment due him, from his debtor or other party in default, should be held to operate as a release of the delinquent officer, in the case of a motion for a false or for an insufficient return.

It is also insisted by plaintiff in error, that for failure to pay over money collected, the officer is liable only for the amount of the original judgment and interest thereon up to the time of the default made, and twelve and a half per cent. damages in lieu of interest.

Section 3600 of the Code authorizes a judgment by

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motion before a Justice of the Peace, against Sheriffs, Constables and Coroners, for money collected by them, with or without judgment or execution, and provides expressly that the judgment shall be for the amount received, with interest thereon and damages.

By section 3592, the plaintiff is entitled to recover twelve and a half per cent. damages, in all cases where damages, on a motion, are allowed, where no specific different sum is given, on the principal and interest due at the time of the rendition of the judgment. And by section 3591 of Code, the Circuit Court has concurrent jurisdiction of all motions cognizable before a Justice of the Peace.

It follows, therefore, that an officer collecting money upon an execution, and failing to pay it over as required by law, is liable to the judgment creditor for the amount of the judgment and the interest thereon, to which will be added twelve and a half per cent. damages.

Let the judgment of the Court below be affirmed.

SOLOMON ROTHCHILDS, Plaintiff in Error, v. S. M. FORBES.

1. RECORD. *Motion proved by action on it.* An entry of record showing that a motion to dismiss a *certiorari* is disposed of, is sufficient to show that the motion was made, though no entry of the fact appear of record.
2. STAY OF EXECUTION. *Fi. fa. on affidavit. Against whom.* The plaintiff in a judgment before a Justice of the Peace, on which the execution has been stayed, if he procures an execution under the Act of 1846, c. 216, s. 2; Code, 3065; upon affidavit of insolvency, etc., of stayor,

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and failure of defendant to justify, *etc.*, is entitled to an immediate execution against both the principal debtor and the stayor.

3. CONTRACT. *How affected by the law.* The liability of the stayor is assumed in view of the existing law, and the issue of an execution before the end of the eight months in a case provided for by the law, is not a violation of the contract, but in conformity with it.

Code cited: 3059, 3060, 3063, 3065, 3066, 3067, 3137.

Statutes cited: 1846, c. 219, s. 2; 1842, c. 136, s. 4.

Cases cited: *Roberts v. Cross*, 1 Sneed, 233; *Howard v. Brownlow*, 4 Sneed, 548; *Apperson v. Smith*, 5 Sneed, 373; *Gaw v. Rawley*, 3 Head, 716.

. FROM BEDFORD.

Appeal in error from the Circuit Court. JOHN W. PHILLIPS, J.

W. H. WISENER, for plaintiff in error.

S. H. WHITTHORNE, for defendant.

NELSON, J., delivered the opinion of the Court.

Forbes recovered three judgments on the 1st of July, 1868, before a Justice, against W. S. Jackson; and Rothchilds, within the time prescribed by law, became stayor of execution in each case. But, on the 30th of July, 1868, before the expiration of the time allowed by law for stay, executions were issued against Jackson as principal, and Rothchilds as stayor, which were levied on the 31st of July, 1868, on the stock of goods, wares and merchandise of Rothchilds. On the 4th of August, 1868, Rothchilds presented his petition for writs of *certiorari* and *supersedeas* to J. W. Phillips, Judge of the Seventh Judicial Circuit, who issued his fiat, addressed to the Clerk of the Circuit Court at Shelbyville, directing the issuance of the writs, on the petitioner giving bond, with

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good security, in double the amount of the execution complained of; and bond having been executed, the writs were issued accordingly on the same day. No formal motion appears in the transcript of the record to dismiss the writs; but it is shown that, at August Term, 1868, the parties came, "by their attorneys, and, upon argument being heard, the motion to dismiss the *certiorari* was sustained; and, thereupon, the defendant prayed an appeal, which was granted by giving bond as required by law, which was accordingly done." Although it is quite informal, it may, perhaps, be inferred from this entry that the motion to dismiss was duly made at the return term; and it may also be inferred from the appeal bond, which recited that the appeal was prayed to the next term of the Supreme Court to be held in Nashville, that the appeal was prayed and granted to this Court.

It is stated in the petition that a short time after the petitioner stayed the judgments, to-wit, on the 22d day of July, the plaintiff, T. M. Forbes, made oath before the Justice, that, owing to the insufficiency, or insolvency, of petitioner, the three judgments were in danger of being lost; that notice was given to Jackson, under the statute in such cases made and provided, to appear before the Justice, on the 29th of July, 1868, and justify the stay of execution, or give other and better security, and that Jackson failed, neglected or refused to do so. Petitioner insists that in consequence of this action, he was not accepted by the plaintiff as stayor, and is exonerated from liability; but that, if this position is untenable, no execution could lawfully issue against him until after the expiration of the eight months allowed by law for the

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stay of execution, and that it was a violation of his contract to issue it at an earlier period.

Neither of these propositions can, under the provisions of the Code, be maintained. Section 3065, which substantially re-enacts the Act of 2nd of February, 1846, c. 216, s. 2, provides that, "if the plaintiff deems his debt in danger of being lost on account of the insolvency, removal, or insufficiency of a stayor, he may, at any time, make oath of that fact before the Justice having possession of the papers in the cause, and, upon giving the defendant two days' written notice of the time of his application, require the defendant to justify or give other security; and, if the defendant fail to justify or to give other security to the satisfaction of the Justice, execution shall issue forthwith."

In construing this section it is proper to consider the law as it existed prior to its passage, and also before the Act of 2d February, 1846, with the view to its correct exposition. It had been held, previous to the Act of 1842, c. 136, s. 4, that a stay of execution, entered more than two days after the judgment, was void. 2 Meigs' Dig., p. 657. That Act authorized the Justice to receive and enter security for the stay of the judgment at any time before payment or the issuance of execution, with the consent of the plaintiff or his agent; and the provision as to a stay at any time before payment, was transferred to the Code, 3060. This section was intended to obviate, in whole or in part, the cases of *Roberts v. Cross*, 1 Sneed, 233; *Howard v. Brownlow*, 4 Sneed, 548, and *Apperson v. Smith*, 5 Sneed, 373, in which it was held that a conventional stay, variant from the general

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law, and made after the expiration of the two days allowed for staying, or after the issuance of an execution, or for part of the debt only, or for a shorter time than that allowed by law, or in a mode different from that prescribed, was nugatory and inoperative.

It is said, in *Roberts v. Cross*, 1 Sneed, 235, that "the stay of an execution is, in effect, a confession of judgment, and the stayer is liable under the law applicable to such judgment, and not otherwise." What, then, is the true meaning of section 3065? Was it the intention of the Legislature to exonerate the stayer, if the fact of his insolvency, removal or insufficiency, was ascertained at any period between his confession of judgment and the time limited for the expiration of the stay, if no new surety was given? Surely not; for if such were the effect of the application of the judgment creditor, to have the solvency of the stayer adjudicated, or new security given, it would enable the stayer, either by being insolvent when he confessed judgment, or by becoming so afterward, to practice a fraud upon the creditor. The principal might be solvent at the time of entering the name of the security for stay, and yet become insolvent before the creditor could ascertain the insolvency, removal or insufficiency of the stayer; and the creditor might lose his debt, because the stayer had, by his own act, postponed his right of collection.

The Code, in section 3059, provides that the security to be entered on the Justice's docket, shall be good and sufficient; and the very act of staying is equivalent, under this provision, to an assertion, or contract, on the part of the principal and his stayer, that the latter is solvent

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and a good security for the debt. If he was not a good and sufficient security for the debt when he assumed the relation of stayor, then his contract was broken so soon as it was made; and the remedy provided by the statute against the fraud or breach of contract, is the issuance of execution so soon as that fact is ascertained, and instead of being allowed eight months, he then became liable to pay immediately. This is not a change of the statutory contract, but is the meaning of the contract itself, as contemplated by the statute; for, on the failure to give other security, the Justice is directed to issue execution forthwith. The stayor is not taken by surprise, as he knows, or is presumed to know, that this is his liability when he assumes it. If he pays off the judgment, he may have a judgment over, before the Justice, against his principal, under section 3067. If he makes affidavit, in writing, that he is fearful, and believes that if execution is further stayed he will be compelled to pay the judgment, he may, under section 3063, at any time, cause the Justice to issue execution against the debtor and himself. The statutory judgment, which is, *prima facie*, suspended for eight months, may, therefore, become collectable at any earlier period, at the instance either of the creditor or surety, and in the mode prescribed.

Sections 3063 and 3065 must be construed together, in order to ascertain the intention of the Legislature. In the first it is directed that, at the instance of the stayor, the execution shall issue against the debtor and stayor. In the section last named, the provision is, that, at the instance of the creditor, the execution shall issue forthwith, meaning such an execution as is mentioned in the

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previous section, 3063; an execution against the debtor and stayor. If it had been the intention to sever the judgment, and authorize the singular proceeding of two executions on the same judgment, issuing at different periods of time, it would not have been difficult to express such intention; and, in view of the careful provisions of the statute, manifestly framed with full and accurate knowledge of the previous statutes and decisions, it is to be presumed that it would have been so expressed. This construction is aided by section 3066, which provides that "the entry of the stay on the Justice's docket, under the provisions of the foregoing sections, is a sufficient authority to the Justice to issue execution against the defendants to the judgment, and the stayors at the proper time.

Now, if it had been the intention, in the previous sections, to award execution against the judgment debtor only, before the expiration of time limited for stay, and to suspend it as to the stayor until after the expiration of the eight months, or if it had been the intention to allow the issuance of execution against the debtor and stayor, but not to allow it at the instance of the creditor, it is to be presumed that this intention would have been expressed in appropriate language—in the plural, and not in the singular—and the use of the latter mode of expression is conclusive to show that the meaning of both sections is, that execution shall issue jointly against the debtor and stayor. The expression in section 3066, "at the proper time," means at the expiration of eight months, if no steps are taken to cause an earlier issuance of the execution, but at any time within the eight months, if the stayor or creditor shall make out a proper case to expedite its issuance.

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The precise point now determined was not adjudicated in *Gaw v. Rawley*, 3 Head, 716, which settles only the liability of the new, or second, stayor. But Judge Caruthers, who delivered that opinion, quotes the expression in the Code, that the execution shall issue "forthwith;" and if he had been of opinion that the intention was to change, as in some other cases, the ordinary rule, that the execution shall pursue the judgment, it is not improbable that the supposed new feature in the statute would have elicited observation.

Let the judgment of the Court be affirmed, the petition for *certiorari* be dismissed, and a judgment rendered here against the appellant and his securities in the appeal bond, for the amount of the judgment mentioned in the petition, with interest, damages and costs, pursuant to the Code, 3137.

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1. CERTIORARI. *To quash execution. Petition.* Where a *certiorari* is brought to quash an execution, and not for a new trial, the Court can look only to the grounds stated in the petition.
2. STAY OF EXECUTION. *Act of 1861.* A stay, under the Act of 1861, c. 2, ss. 1, 2, 3, of execution, on a judgment rendered more than eight months before its passage, and on which a stay had been allowed, which had expired, was unauthorized and void.
3. SAME. *Jurisdiction. Contract.* Judgments against sureties for stay can not be supported upon the ground of contract only; there must be jurisdiction in the Justice to render the judgment.

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Cases cited: *Hollins & Co. v. Johnson*, 3 Head, 347; *Patrick v. Driskell*, 7 Yer., 140; *Howard v. Brownlow*, 4 Sneed, 550; *Agee v. Demerit*, 1 Hum., 332; *Holt v. Davis*, 3 Head, 629.

FROM WILSON.

Appeal from the Circuit Court, before H. COOPER, J.

STOKES & SON, for plaintiffs, insisted that the original stay was vague and void; *Barr v. McGregor*, 11 Hum., 518; *Rhodes v. Chappell*, 11 Hum., 527, not cured by acquiescence, *Mayfield v. McLary*, 3 Head, 159. Under Code, 3060, stay good by consent, of which acquiescence is proof, *Neil v. Beaumont*, 3 Head, 627; *Taliaferro v. Herring*, 10 Hum., 272. Stay good without Act of 1861; not bad because it purports to be under that Act—*Roberts v. Cross*, 1 Sneed, 233. Law changed since *Howard v. Brownlow*, 4 Sneed, 548; *Apperson v. Smith*, 5 Sneed, 373, by Code, 3060, and Act of 1861. If a contract is impaired, it is the original one, not that of the stayor; he cannot set up the objection; *Cooley on Con. Lim.*, 163, 4; *N. O. C. Nav. Co. v. N. O.*, 12 La. An., 364; *Sinclair v. Jackson*, 8 Cow., 543. See, also, *Nelson v. Churchill*, 5 Dana, (Ky.) 336; *Small v. Hodges*, 1 Little (Ky.) 16; *Berry v. Haynes*, 2 N. Car. L. Repos. Stayor cannot attack original judgment; *Orgill v. Hunter*, 2 Head, 345; 10 Hum., 273. Act of 1861 held not to impair contracts. *Farnsworth v. Vance*, 2 Cold., 108. Laws affecting validity, construction, discharge, or evidence of contract, affect its obligation. *Green v. Biddle*, 8 Wheat, 1; *Brannon v. Kinzie*, 1 How., 311; *Townsend v. Townsend*, Peck, 1; *Greenfield v. Dorris*, 1 Sneed, 550; *Gaullys Less v. Ewing*, 3 How., 716; *Poole v. Young*, 7 Mon., 587.

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Law of the remedy no part of obligation. *Sturgis v. Crowninsheld*, 4 Wheat, 122; *Mason v. Haile*, 12 Wheat, 370; *Coleman v. Pres't, etc.*, Cooke, 258; *Hodge v. Dillon*, Cooke, 279; *Woodfin v. Hooper*, 4 Hum., 13; *Greenfield v. Dorris*, 1 Sneed, 550; Gault's Appeal, 33 Penn. St. R., 94; *Chadwick v. Moore*, 8 Watts & Serg., 49; *Butler v. Palmer*, 1 Hill, (N. Y.) 324; *United States v. Conway*, 1 Hemp. C. C. U. S., 313; *Conkey v. Hart*, 14 New York, 22; *Wood v. Child*, 20 Ill., 209; *Mason v. Haile*, 12 Wheat, 370. Extending time to redeem, *Iverson v. Shorter*, 9 Ala., 713; *Bugbee v. Howard*, 32 Ala., 713; or shortening, *Butler v. Palmer*, 1 Hill, 324. Exemption laws, *Allen v. Cook*, 26 Barb., (N. Y.) 374; *Norris v. Moulton*, 34 N. H., 392. Changing Limitations, 3 Story on Con., § 1379. Stay law, *Coleman v. Pres't*, Cooke, 258; *Hodge v. Dillon*, Cooke, 279; *Chaffet v. Michaels*, 31 Penn. St. R., 282. Appraisement law, *United States v. Conway*, 1 Hemp. U. S. C. C. R., 313. To protect persons in army by stay, *Brestinback v. Bush*, 8 Wright, (44 Penn. St.,) 317; *Cox v. Marshall*, *Ib.*, 322; *Clack v. Martin*, 49 Penn., 300.

A. A. HARRIS, with them, cited: On presumption of constitutional action, 12 Wheat, 270; 6 Cranch, 129; 3 Dallas, 395. Act of 1861, valid, 12 Wheat, 351; 2 Yer., 123; 4 Hum., 13; 3 Wheat, 123; 2 Cold., 108. Stayor bound by contract, made for good consideration, and voluntarily, 1 Par. on Contr., p. 446, § 3; 2 Par., 4; 3 Head, 627. Estoppel, 1 Greenl. Ev., § 22.

WILLIAMSON & MARTIN, for defendants, cited: Peck, 1; 5 Monroe, 98; 7 Monroe, 11, 544; 4 Littell, 35

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117; 2 Par. on Contr., —; 8 Wheat, 1, 75; 2 How., 608; Hemp., 313, 533, 536. Relied on the previous stay, and its expiration before Act of 1861, to distinguish this from 2 Cold., 108.

FREEMAN, J., delivered the opinion of the Court.

This is a petition for *certiorari* and *supersedeas*, to quash two executions, issued in favor of Noel & Co., against complainant, Scoby, as stayor, under the Act of the Legislature, passed January 26, 1861.

The case was tried by his Honor, Judge Henry Cooper, on motion to quash the execution, who sustained the motion, holding that Scoby was not liable as stayor, from which judgment Noel & Co. appealed to this Court.

The facts material to be stated, are: That Noel & Co. had obtained two judgments, before a Justice of the Peace for Wilson county, against J. A. Anthony, dated 21st of April, 1860, which were stayed by one S. M. N. Cook, by orders given to the Justice in writing, for eight months. This stay expired on the 21st of December, 1861, more than a month before the passage of the Act of 1861, entitled "An Act prescribing the remedy for collection of debts, and for the relief of the people."

On the 29th of January, 1861, three days after the passage of this Act, Scoby sent to the Justice the following order:

"J. P. Cawthon, Esq.:

"SIR: I will become additional stay security to two judgments or executions, in favor of S. A. G. Noel vs. J. A. Anthony, one for one hundred and twenty-four dollars and forty-one cents, and the other for three hun-

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dred and fifty dollars and eight cents. This stay to be done in conformity with the late Act of the present Legislature. J. B. SCOPY."

On the 10th of January, 1866, executions were issued on these judgments against Anthony, the principal debtor, Cook, the original stayor, and Scoby, which were levied on property of Scoby; and these executions were quashed by his Honor, the Circuit Judge. The question is, whether this judgment, quashing these executions, is correct or not.

In cases where the *certiorari* and *supersedeas* are resorted to, to supersede and quash the execution, and not for a new trial on the merits, this Court can only look to the grounds stated in the petition, and no others are open for investigation. *Hollins & Co. v. Johnson*, 3 Head, 347.

The grounds stated in the petition are as follows: "The said judgments against petitioner as additional stayor are illegal and void, for the reason that the stay of eight months allowed by law had expired long before the Act of 1861, providing for additional stays of execution, under the provisions of which he was entered as stayor; and in regard to contracts entered into and judgments rendered before the passage of said act, it could have no effect to delay the collection of the same."

The first ground stated raises the question fairly; taken in connection with the facts of the case; as to whether the case was one where, by the provision of said act, the additional security for stay of execution, could be taken by a Justice of the Peace. This question is not free from difficulty; but upon careful examination of the

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act, we are of opinion that a case like the present was not embraced by the terms of said act.

Section 1 of said act is prospective, provides for stay of judgments that may be rendered "from and after the passage" of the act, either in courts of record, or before Justices of the Peace, for the term of twelve months, provided "that the *defendant* or *defendants* in said judgment or decree appear before the courts, or in two days after judgment before the Justice, and give good and ample security for the stay of execution, to be approved of by said courts or the Justice," etc. Section 3 provides, "that in all cases where judgments or decrees have been rendered by any of the courts or Justices of the Peace of this State, upon which executions have not been issued, or upon which executions have been issued and not levied, the *defendant* or *defendants* in said judgment or execution, may appear before the Justice of the Peace, or Court, if in session, or before the Clerk of said Court, in vacation, and upon giving good and ample security to said Justice, Court or Clerk, as the case may be, in the manner provided in the second section of this act for giving additional security, said execution shall be stayed for the period of six months from the time said security shall be given, *when execution may issue against the parties* to the original judgment and the security for the stay of execution."

It might fairly be held, from the terms of this last section, that the case of a judgment on which execution had already been stayed for eight months, was not intended to be included in this section, as it provides "that the defendant or defendants" in said judgment are to ap-

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pear before the Justice and give the security; and that at the end of the six months an execution may issue against the *parties* to the original judgment, and the security for stay of execution;" that is, the stayor under this statute. No reference is here made to any one but the parties to the original judgment, either in the part of the statute allowing the party to procure the security, or in that portion which provides for the issuance of the execution after expiration of the six months..

If the Legislature had contemplated a case of an execution stayed before the passage of the act, would they not have provided that the execution should issue against the parties to the original judgment, and the stayor to the same, if it had been stayed? It certainly could not be intended that, in the event the judgment had been previously stayed, that such stayor shall be released from his obligation; yet such would be the effect of the statute, if such case is included in its provisions, for it is clearly provided that execution shall issue against the parties to the original judgment and the stayor for six months, under this act.

This view of the statute is, in some degree, strengthened by the fact that the Legislature seems carefully to have made provision for the issuance of execution in case of two stayors, as provided for in section 2 of the act. In that section, it is provided, that if the stayor first given under the act, shall be shown to be not good and sufficient, the party defendant may be notified and required to give additional security; and then the fourth section provides, that the first security for stay "shall not be released from liability, but execution shall issue

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against the original parties to the judgment, and against the first, as well as the additional, securities."

It will be seen, further, that the Legislature, in the latter part of this fourth section, has used the term, "original parties to the judgment," in such way as to exclude the idea that they could have meant by "parties to the original judgment," in the third section, a stayor of judgment; for they provide that the "execution shall issue against the original parties to the judgment, and against the first as well as additional securities."

It has been very earnestly pressed upon us, in the very able arguments presented by counsel, that the plaintiff, Scoby, was liable by virtue of his contract as stayor; and the principle of liability as guarantor has been invoked to fix his liability.

The question however, presented, is not a question of contract at all, but arises on a judgment rendered by a Justice of the Peace, on which an execution has been issued; and the validity of that execution is questioned on the ground that the Justice had no power to render the judgment, or rather to receive and enter the name of the party as stayor, which is, in legal effect, a confession of judgment, and has the force and effect of a confession of judgment. It is not a question of contract, but one of jurisdiction in the Justice, to do the act by which the judgment is confessed. If he had no such power, then the act is void, and the confession of judgment is a nullity, and the execution based thereon has nothing on which it can rest, and was properly quashed. Such is the uniform view taken of the question by this Court. We need only refer to the cases of *Patrick v. Driskell*, 7

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Yer., 140; *Howard & Co. v. Brownlow*, 4 Sneed, 550, 551, and *Apperson & Co. v. Smith*, 5 Sneed, 374–5. In the last of which cases, the Court says: “Whatever effect may be given to the contract of parties variant from the stay law, this Court can only regard as a valid stay of execution such undertakings as are entered into in pursuance of those laws. Neither the magistrate or the parties can be allowed to change those laws by contract. Any such action of the Justice does not constitute an official or judicial act;” and in this case, the execution was quashed on application of the stayor, although he had entered his name himself as stayor, with all the formalities necessary to have bound him in a case where the Justice had the authority to receive a stayor.

It may be added, that the order to the magistrate to enter the party as stayor, is not the basis of the liability here sought to be enforced; but is only in the nature of an authority or power of attorney to the Justice, by which he is authorized to make the entry on his docket. The liability grows out of this judicial act, and not by virtue of a contract; is one of jurisdiction in the Justice, and consent cannot confer jurisdiction over the subject matter, though it may over the persons. *Agee v. Dement*, 1 Hum., 332.

As to the question of the validity of the first stay of execution by Cook, we need but remark that if he acquiesced in it, and suffered the judgment to remain in force against him, no one else can, in a proceeding like this, make the objection to his liability. *Holt v. Davis*, 3 Head, 629.

This view of the case is decisive as to the liability of

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Scoby, and relieves us from discussing and deciding the question, upon which there is much conflict in the decided cases, as to whether this law impairs the obligation of the contract. We leave this question without deciding it, because this law has already expired by its own limitation, and probably no case will be likely to arise in which the decision of the question will become important.

The judgment of the Circuit Court will be affirmed.

JAMES STORY v. GEORGE DOBSON and WM. SHANE,
Administrators, &c.

1. PLEADING. *Oyer*. A demurrer which craves *oyer* of a note, but does ~~not~~ set it out, does not make the note part of the record.
2. BANK OF TENNESSEE. *New issue*. The "new issue" of Bank of Tennessee notes is not an illegal consideration for a note, when taken by the maker of the note without any illegal purpose.

Case cited: *Naff v. Crawford*, 1 Heis., 111.

FROM BEDFORD.

E. COOPER, COLDWELL & WARDER, for plaintiff in error.

JAS. L. SCUDDER, for defendants.

FREEMAN, J., delivered the opinion of the Court.

This was action commenced by plaintiff against de-

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fendants, in the Circuit Court of Bedford county, on a promissory note, with a declaration in usual form, for the sum of one thousand dollars.

The defendants demurred to the declaration, craving *oyer* of the note in the declaration mentioned, and then stating causes of demurrer. The note, however, is not set out upon *oyer*, or made part of the record by bill of exceptions. We can not notice it, therefore. The profert of the note does not make it part of the record; and the defendant, by his demurrer, has totally failed to make it part of the record; so that we cannot see that the objections to the note made in his demurrer are well taken.

If, however, the note was before us, and sustained the objections made in the demurrer, yet we would be bound to hold that the demurrer was not well taken. However illegal the issue of what is known as the "new issue" of the Bank of Tennessee may be, the fact that the notes were issued without authority, or for a wrong purpose, can make no kind of difference to the defendant in this case. His undertaking was not to aid in this unlawful purpose, nor is there anything in his contract in aid of the rebellion or in violation of law. We need only refer to the case of *Orchard v. Hughes*, 1 Wal., 73; *Thorington v. Smith*, 8 Wal., 1, and a late case decided by this Court at Knoxville, of *Naff v. Crawford*, 1 Heiskell, 111, as furnishing the principles on which this decision is based.

We express no opinion whatever as to the validity of what is known as the "new issue" of the Bank of

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Tennessee, that question not being before us, or considered by us.

The case will be reversed, and remanded to the Circuit Court for further proceedings.

W. W. CLOPTON *et als.* v. ELIZABETH CLOPTON *et als.*

1. RULE IN SHELLEY'S CASE. *Estates not of same character.* "Lend" creates equity. Where an estate is "lent" to the first taker for life, and then given to the heirs of his body, the rule in Shelley's case does not apply.
 2. VESTED ESTATE. *Vendible.* In such case, the legal estate, not being disposed of by the will, vests in the heirs of the donor until the death of the tenant for life; a vested interest, coupled with a possibility that the whole estate, by the failure of heirs of the life tenant, might vest in them in possession. Such interest is capable of sale, devise or descent.
- Cases cited: *Loving v. Hunter*, 8 Yer., 4; *Settle v. Settle*, 10 Hum., 474; *Vaden v. Hance*, 1 Head, 300; *Polk v. Farris*, 9 Yer., 210.

FROM WILSON.

In the Circuit Court, before HILARY WARD, J.

This case having been once argued before the late Judges, and continued on advisement, was re-argued at this term.

JORDAN STOKES, for the plaintiff, insisted that the widow took a life estate. *Stow v. Davis*, 10 Ired. L., 431. "Lend" gives an equity: *Loving v. Hunter*, 8 Yer., 4; *Settle v. Settle*, 10 Hum., 474; *Vaden v. Hance*, 1 Head, 300. Commented on *Alston v. Davis*, 2 Head,

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266, citing *Owen v. Hancock*, 1 Head, 566. Statute of limitation did not run: *Porter v. Greer*, 1 Cold., 564; *McCorry v. King's heirs*, 3 Hum., 267. The interest of the heirs of the deviser was a mere possibility of reverter: 1 Washb. on Real Prop., side p. 63; 2 *Id.*, 240. As to the devolution of such estate, he cited *Exum v. Davie*, 1 Murphy, 475-483; *Lawrence v. Pitt*, 1 Jones, 344; *Bates v. Shraiden*, 13 Johns., 260; *Jackson v. Hendricks*, 3 Johnson's Cas., 214; *Jackson v. Hilton*, 16 Johns., 96; *Adams v. Chafin*, 1 Hill Ch., (S. C.) 265; *Barnit's Lessee v. Casey*, 2 Cond. R., (U. S.) 567; 7 Cr., 456, S. C. Legal title in abeyance: *Chudleigh's case*, 1 Coke, 134; 4 Kent, side pp. 258-261; *Goodright v. Searle*, 2 Wils., 34-35. No estoppel: 24 Pick., 328; 5 Cush., 56, 63; 3 Hum., 277; 2 Washb. on Real Prop., side p. 465.

WILLIAMSON & MARTIN, for defendants, argued that this was a life estate, with contingent remainder, citing 2 Bl., side p. 169; Greenl. Cruise, 2 Bk., Tit. Remainder, side p. 215; 4 Kent, side p. 208; 2 Washb. on Real Prop., side p. 236. Legal estate descended to the heir: Fearn on Rem., top pp. 354, 357; 4 Kent, side pp. 254, 257, 259; Greenl. Cr., side pp. 33, 326, 334, 336, 273; 2 Washb. on Real Prop., side p. 263, § 5; 389, 390, 391, 410; Mass., 37, 44; 3 Metc., 187; 10 Metc., 393, 54, 217.

NICHOLSON, C. J., delivered the opinion of the Court.

This is an action of ejectment, tried at the June Term, 1866, of the Circuit Court for Wilson county. Plaintiffs claim the tract of land of two hundred acres,

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sued for, as the heirs of Walter Clopton, deceased. The defendants are the widow of John A. Clopton; a son of Walter Clopton, and P. and T. Harris, who claim a portion of the land as purchasers from John A. Clopton.

The questions for our determination arise upon the construction of the will of Walter Clopton.

It appears from the facts, as agreed upon, that Walter Clopton made his will in 1832, and died in 1834; that at his death he left seven children, and the children of a deceased son, and his widow, surviving him. It appears that all the children of Walter Clopton were dead at the institution of the suit; his daughters, Eleanor and Martha, and his son, John A., without issue; the others leaving children, who are the plaintiffs in the action. It appears that John A. took possession of the land upon the death of Walter Clopton's widow, to whom it was devised for life, and that he claimed it absolutely until his death, in 1863, and died, leaving his widow in possession; and that in 1839 and 1842, he sold about forty-three acres of the land to Arbuckle and Wortham, who, in 1845, sold to defendants, P. and T. Harris, who have been in adverse possession, under the deeds of John A., to the bringing of the suit.

The questions for determination arise upon the seventh clause of Walter Clopton's will, as follows: "I give unto my son, John A. Clopton, one horse; also one saddle and bridle, which he has in possession; also one bed and furniture, which he now has in possession; also the blacksmiths' tools and shop, with the appurtenances, and the house in which he now lives; also, I lend unto my son, John, during his natural life or resignation, all the bal-

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ance of my land and appurtenances that is not deeded or willed after the death of my wife, in this my will, and at his death or resignation, to revert to the lawful begotten heirs of his body."

Our first duty is to ascertain the intention of the testator, and to carry it into effect, unless that intention contravenes some fixed rule of law. Although this clause of the will is somewhat inartificially drawn, and expressed in language not entirely clear from ambiguity, we have no real difficulty in comprehending the purpose and intention of the testator. His object, to make an absolute gift of the personal property specified to his son, John, is clear of all doubt. It is equally clear, that he did not intend to make to him an absolute gift, even for life, of his land; but he intended to give him the right to use, occupy and enjoy it during his life, or until he should resign such use, occupation and enjoyment; and then he intended it to go to John's children. His purpose to provide for the comfortable support of his son, John, by giving him the use of the land, is obvious; but at the same time, his object was to secure the lands ultimately to his son's children. The will was evidently prepared under the expectation that his son, who had then been married but a short time, would have children; and, under this expectation he made no provision for the disposition of the land, in the event he should die without children. It follows, that, as John only took an equitable interest for life in the land, whereas the devise to his heirs gives to them the legal title, the rule in *Shelly's Case* has no application. The words, "heirs of his body," were used as words of purchase, and not of lim-

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itation. *Loving v. Hunter*, 8 Yerg., 4; *Settle v. Settle*, 10 Hum., 474; *Vaden v. Hance*, 1 Head, 300; *Polk v. Faris*, 9 Yer., 210.

Having ascertained that the testator intended to give to his son, John, only an equitable interest in the land, the question is presented, in whom was the legal title vested after the death of the testator, and until the death of John, the tenant for life? As the testator did not divest himself of any portion of his title during his life by the execution of his will, and, as at the time of his death he was vested with the entire fee simple estate, it follows, that, upon his death, the equitable title, after his widow's death, passed to his son, John, for life; but the legal title was not disposed of, except upon the contingency of his son, John, having heirs of his body. During the interval between the death of the testator and his son, John, the legal title, so far as it was controlled by the will, was undisposed of. As the law favors the vesting of titles, and discourages their abeyance, never admitting it but from necessity, (4 Kent, 259,) it is clear that the title followed the rules of descent in cases of intestacy, and vested in the heirs of the testator living at the time of his death. If the heirs of the testator took no vested interest, but if the vesting in interest depended upon a contingency, which, by possibility, might never happen, they took a bare or naked possibility. It was mere hope or expectation, such as an heir apparent has during the life of his father, and of course could not be disposed of. *Exrum v. Davie*, 1 Murphy, 484; 4 Kent, 260; *Adams v. Chafin*, 1 Hill, (S. C.,) 265. But if the vesting in possession only, depended on a contingency,

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which, by possibility, might never happen, they took a *possibility* connected with an *interest*; or, which is the same thing, there was a present interest in existence, although the taking effect of that interest in possession depended on a future event. It is well settled that such an interest is descendible, releasable, assignable, and devisable. *Exum v. Davie*, 1 Murphy, 484; 4 Kent, 257; 2 Washb. Real Prop., 263.

This was the character of the interest of the heirs of the testator, upon his death. They took the legal title by descent, subject to the equitable life estate of John, and liable to be entirely divested of their title by the death of John with bodily heirs. It was, therefore, a contingent remainder or reversion. 2 Blk. Com., 169; 4 Kent, 208; 2 Washb. Real Prop., 236. Their title was not a mere expectation, not a mere possibility of reverter, but a present interest or reversion, liable to be defeated by the death of John with heirs of his body, and capable of being ripened into a perfect title in possession by the death of John without bodily heirs. This interest being transmissible, assignable and releasable, it follows, that, at his death without bodily heirs, John's title to his own share, and to that assigned to him by his brother William, and to his proportion of the shares of his deceased sisters, Martha and Eleanor, was made absolute by the non-happening of the contingency on which the consummation of the title depended. In like manner, the titles of the plaintiffs to the residue of the land were consummated and perfected; and upon the death of John intestate and without children, his portion of the land descended to the plaintiffs, his heirs, subject to the con-

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veyances to Arbuckle and Wortham, and to the widow's dower, and to the claims of creditors.

The judgment of the Circuit Court will be reversed, and a judgment rendered here in accordance with this opinion.

R. B. McLEAN, Plaintiff in Error, v. C P. HOUSTON.

1. EXECUTOR. *Before probate. Sale by. Fraud.* A sale made by a person as executor, when he has not proved the will, or qualified as executor and given bond, he withholding the facts fraudulently, would be void.
2. FRAUD. *A defense at law.* Such facts may be pleaded at law in defense to a sealed instrument.
3. SAME. *Same.* If not otherwise pleadable, it could be done by way of set-off, or cross action.
4. PLEADING. *Fraud. Return of property.*¹ It is not necessary, where a person sets up fraud in a sale, that there should be an averment of the return of the property. Citing *Ford v. Thompson*, 1 Head, 265; and *Conner v. Crunk*, 2 Head, 249.
5. SAME. *Same. Excuse for non-return of slave.* If it were necessary to aver a return of the property, the fact that "the slave, (the property in question,) had gone off and become practically free," and that the defendant was disturbed in his possession of said slave, who became a freeman," was not sufficient excuse.

Code cited: 2884, 1804, 2918.

Statutes cited: 1860, c. 33, p. 27; 1856, c. 71; 1850, c. 60.

Cases cited: *Ford v. Thompson*, 1 Head, 265; *Word v. Cavin*, 1 Head, 508;

¹ On the necessity of a return of property in a suit for fraud, see *Cooke*, 245; *Arendale v. Morgan*, 5 Sneed, 712; *Stockley v. Rowley*, 2 Head, 495; *McGarock v. Wood*, 1 Sneed, 184. And see *Am. Law Rev*, vol. 2, 636.

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Conner v. Crunk, 2 Head, 249; *Rosson v. Hancock*, 3 Sneed, 434; *Sample Looney*, 1 Tenn., 85; *Gwinther v. Gerding*, 3 Head, 197; *Mullins v. Jones*, 1 Head, 517.

FROM BEDFORD.

In the Circuit Court, before J. W. PHILLIPS, J., presiding on the argument of the demurrer, and at the trial.

H. L. DAVIDSON & BUCHANAN, for plaintiff in error, cited: *Fay v. Reager*, 2 Hum., 200; *Ward v. Bowen*, Ib., 58; *Woods v. North*, 6 Hum., 309; *Gwinther v. Gerding*, 3 Head, 197. Commented on *Word v. Cavin*, 1 Head, 506, and *Shaw v. Smith*, 9 Yer., 97. Cited *Ford v. Thompson*, 1 Head, 265; Code, 2918; Act of 1856, c. 71; *Rosson v. Hancock*, 3 Sneed, 434; *Conner v. Crunk*, 2 Head, 246; *Yerger v. Rains*, 4 Hum., 259; *Allen v. Dodd*, Ib., 131.

W. H. WISENER & SON, for defendant.

NELSON, J., delivered the opinion of the Court.

On the 16th of November, 1864, Houston brought this action of debt, in the Circuit Court of Bedford, against McLean, the plaintiff in error, and one Nance, as to whom a *nolle prosequi* was entered. A declaration was filed according to the form in use before the Code, upon an instrument styled "a bill single," to which the plea of *nil debit* was pleaded "in short;" and in his second plea, the defendant craved oyer of the bill single sued upon, which was set out in said plea, in the words and figures following, viz:

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“\$1,025. Twelve months after date, we or either of us, promise to pay Caleb P. Houston, executor of Miss Ann Guy, deceased, one thousand and twenty-five dollars, for value received. February the 20th, 1863.

“R. B. McLEAN, [Seal.]

“RICHARD NANCE, [Seal.]”

In his second plea, McLean alleged that the bill single was executed and delivered to the plaintiff, as executor of Ann Guy, for the price of a certain slave sold by said Houston, as executor of Ann Guy, deceased, at public sale; “that said Houston fraudulently represented to all persons at said sale, that he was the executor of the last will and testament of said Ann Guy, deceased, when in fact he had not proved the will of said Ann Guy, and given bond and qualified as such executor; which facts were fraudulently withheld from the bidders at said sale. Defendant further avers and says, that he never offered to return said slave to said Houston, because he did not know that said Houston had not proven said will, given bond and qualified, when he sold said slave as aforesaid, until the — day of —, 1864; and at that time, said defendant had no power or control of said slave; he had gone off, and was, practically, free, and could not be returned. He further states, that he was disturbed in his possession of said slave, who became a freeman. He further says that said Houston has never made him a title to said slave. Whereupon, defendant says that the consideration of said bill single has wholly failed. All of which he is ready to verify.”

The plaintiff, in the court below, filed a special demurrer to said plea, alleging, as causes of demurrer:

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First, that the defendant had never tendered said slave back. Second, because there is no averment in the plea that said slave was ever recovered from him by the proper owner, or any other person whatever. Third, because, having taken title under Houston, he must place Houston in the same condition he was in before the sale and purchase. Fourth, the plea is double. Fifth, it is wholly immaterial, in this state of the case, whether the plaintiff ever made him a title in writing or not. Sixth, because the time is not named when the information of the alleged fraud came to his, defendant's, knowledge.

The demurrer was sustained at December Term, 1867, and thereupon, a jury was impaneled, who found for the plaintiff, on the plea of *nil debit*; and judgment having been rendered in his favor, and defendant's motion for a new trial having been overruled, the latter prayed and obtained an appeal in the nature of a writ of error, to this Court. There is no bill of exceptions; and the only question here is, upon the validity of the second plea.

The plea does not contain any direct or explicit averment that it was represented by the defendant in error, that Ann Guy was the owner of the slave at the time of her death, or that he had authority under the will, or as her executor, to make the sale or to make the title; though it may, perhaps, be inferred that these propositions are embraced in the averments that the slave was sold by said Houston as executor, at the public sale, and that he fraudulently represented himself as executor, when, in fact, he was not legally authorized to act in that character. The substance of the plea seems

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to be, that the "bill single," (if it may be properly so styled, since the Code has abolished the use of private seals in written contracts,) was executed without consideration, or that there was an entire failure of consideration, owing to the fraudulent representation of the executor, that he had the right to make sale of the slave, when he had no such right, and that his sale would confer a good title upon the purchaser, when it did not. Treating this as the substance of the plea, and rejecting, as surplusage, the causes assigned in it for not returning the slave, we hold that the plea is good under section 2884 of the Code, which provides, in substance, that any pleading shall be sufficient when it conveys a reasonable certainty of meaning, and when, by a fair and natural construction, it shows a substantial cause of action or defense. Although the Act of 1860, c. 33, p. 27, authorizes parties to plead in accordance with the laws existing on the subject of pleading before and at the time of the passage of the Code, it does not repeal section 2884; and we are constrained, in this case, to look at the substance rather than the form of the plea.

It is provided in the Code, section 1806, that the want or failure, in whole or in part, of the consideration of a written contract, may be shown as a defense, total or partial, as the case may be, to an action brought by any one who is not an innocent and *bona fide* holder; and section 1804 provides, in its second clause, that "the addition of a private seal to an instrument of writing hereafter (thereafter) made shall not affect its character in any respect." Under these sections, but especially the last, which places a sealed instrument on

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the footing of a promissory note, we hold that the want, or failure, of consideration, may be pleaded to a sealed instrument, as it might have been pleaded to an unsealed instrument before the Code. Did any doubt exist as to the correctness of this construction, there can be no doubt as to the validity of the plea, under section 2918, subsections 2 and 3, which provide that "the defendant may plead, by way of set-off, or cross action, * * * * any matter arising out of the plaintiff's demand, and for which the defendant would be entitled to recover in a cross action; any matter growing out of the original consideration of any written instrument, for which the defendant would be entitled to recover in a cross action."

The section last quoted was construed by this Court, in the case of *Ford v. Thompson*, 1 Head, 265, which was an action of debt brought upon a note executed for a slave, sold with a written warranty of soundness and of good title, and the note assigned after it fell due. The defense was a failure and want of consideration, and the defendant offered to prove that the slave was diseased and unsound at the time of the sale; to read the bill of sale warranting title and soundness, and also to read a certified copy of a deed of trust executed by his vendor, prior to the sale, conveying the slave to a trustee for the benefit of his creditors. The Circuit Court refused to admit the evidence, on the ground "that the defendant still had the slave in his possession, and had not been disturbed in the possession of the same;" but it was held by this Court, McKinney, Judge, delivering the opinion, that "the exclusion of the evidence was erroneous, in every view of the case, but

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more especially under the Act of 1856, c. 71, substantially incorporated into the Code, section 2918," and that "the evidence offered was admissible either to establish a partial or total failure, or want of consideration."

That case, in its prominent features, is similar to, and in one particular, stronger than the present. There, the vendor had made a bill of sale warranting title and soundness; but here, the plea does not aver the existence of a bill of sale, and the warranty can only be inferred from the facts stated, from which it may be implied that there was a sale of the slave, by a person having the visible ownership and possession, who contracted that he had a lawful right to make the sale, according to the principle stated in *Word v. Cavin*, 1 Head, 508. In *Conner v. Crunk*, 2 Head, 249, it is said that "if redress is sought against a party who has made no warranty, the difficulty is out of the way, and a tender of the property unnecessary as a pre-requisite."

Without commenting upon the case of *Conner v. Crunk*, or the distinction drawn in the opinion, 2 Head, 248, 249, between that case and the case of *Rosson v. Hancock*, 3 Sneed, 436, in which latter case Judge Harris dissented; and without reviewing the cases of *Sample v. Looney*, 1 Cooper's Overton's Tenn. R., 66 foot p., and the cases there cited by the editor, or citing further, the cases in which the doctrine as to recoupment of damages has been considered, it is sufficient to declare that, under the section of the Code above referred to, and in accordance with the cases of *Ford v. Thompson*, and *Conner v. Crunk*, it is not necessary, where there was fraud in the sale of

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property, that the plea should aver it was returned, or offered to be returned. In the case of *Gwinther v. Gerding*, 3 Head, 197, which was an action on the case for deceit in the sale of land, and turned upon the isolated question of a false representation as to title, it was held that the action could be maintained. It is said in the opinion, p. 201, that "fraud vitiates the contract, and the injured party may elect to treat the deed, or contract, as a nullity, and resort to an action on the case for deceit." It is said, further, that "in this view, it can not be at all important whether the contract was executed or executory; or whether the deceit was in relation to a thing included in the deed or something extrinsic, or whether the subject was real or personal property." In the case of *Mullins v. Jones*, 1 Head, 517, which was an action of debt upon a bill single, it was pleaded, among other things, that the bill single was executed to secure the payment of a part of the consideration money of a tract of land, for the conveyance of which, in fee, the vendors had executed their title bond, but that, at the time of the sale, they had no title, legal or equitable, to said tract of land, and had not since acquired any; and this Court held, that, since the Act of 1850, c. 60, the consideration may be inquired into between the original parties to the note; that the consideration, according to the plea in that case, had entirely failed for want of title in the vendors, and that the contract, being void for fraud, the purchaser might treat the whole as a nullity, and avoid the note. 1 Head, 518, 519.

We hold, accordingly, that because of the allegation

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of fraud in this case, the Circuit Court erred in sustaining the demurrer to the plea. In considering the case, we have rejected the statement in the plea of the reasons for not returning the slave, as surplusage, for the reason that if there was fraud in the sale, such an offer was unnecessary. If it were important, we would consider the averments, that "the slave had gone off, and was practically free," and that defendant was "disturbed in his possession of said slave, who became a freeman," as utterly insufficient.

Upon the legal admission by the demurrer, of the truth of the plea, we hold, of course, that there was fraud in the sale of the slave, and remand the cause, to the end that the plaintiff may file a proper replication to the plea. There is nothing in the record to show under what circumstances the executor acted, or whether he was authorized to act by the parties really interested, or whether, after his qualification, there were any acts done by him and the purchaser, or either, to ratify the sale; and, upon these hypothetical questions, we indicate no opinion.

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J. G. WOODS, Administrator, &c., v. F. W. RANKIN, J.
P. MILLER and Wm. A. RANSOM.

1. USURY.¹ *Compound interest is not.* A note stipulating to pay compound interest is not illegal.
2. COMPOUND INTEREST. *Construction of contract.* A stipulation to pay compound interest on a sum, from a date stated, construed to mean that from that date interest is to commence, and that at the end of each year thereafter, interest for the year will be added to the principal, and that the interest for the next year will be computed on the aggregate principal and interest.
3. SAME. *Computation of.* Compound interest, in the absence of any specific designation of the mode, will be held to mean with annual rests.

FROM RUTHERFORD.

Appeal in the nature of a writ of error, from the Circuit Court, J. W. PHILLIPS, J., rendering the judgment.

J. B. PALMER, for the plaintiff, insisted that this was a sale of lands, not a loan; and cited 3 Pars. on Contr., pp. 106, 107, 108; Story on Contr., § 592; Chitty on Contr., 5th Am. ed., bottom p. 710; 2 Parsons on Bills and Notes, p. 406, *et seq.*; *Tousey v. Robinson*, 1 Mar., 663. Compound interest legal, *Hale v. Hale*, 1 Cold., 233; *Union Bank v. Williams*, 3 Cold., 579; 5 Hum., 408.

¹ For late cases on usury, see *Battle v. Shute*, 3 Head, 547; *Wetmore v. Brien*, 3 Head, 723; *Martin v. Nash. B. & L. Ass'n*, 2 Cold., 418; *Caruthers, Ex'rs, v. Andrews*, 2 Cold., 378; *Bolton v. Street*, 3 Cold., 31; *Turner v. Odum*, 3 Cold., 455; *Lindsley v. James*, 3 Cold., 477; *Parham v. Pulliam*, 5 Co'd., 509; *Bumpass v. Reams*, 1 Sneed, 597; *Esse'man v. Wells & Ewing*, 8 Hum., 488; *Porter v. Jones*, 6 Cold., 313; *McFerrin v. White*, 6 Cold., 499; *Cate v. Blair*, 6 Cold., 639.

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E. H. EWING, with whom was HANCOCK, for the defendants, cited the Code, 1943, 1944, 1945; *Union Bank v. Williams*, 3 Cold., 579; distinguished *Hale v. Hale*, 1 Cold., 233, from this case; commented on *Kellogg v. Hickok*, 1 Wend., 521, cited in *Hale v. Hale*.

DEADERICK; J., delivered the opinion of the Court.

The plaintiff, as administrator of Wm. C. Fletcher, brought suit in the Circuit Court of Rutherford County, against the defendant, upon the following note under seal:

"\$4,300. On the 1st day of December, 1866, I promise to pay J. P. Miller forty-three hundred dollars, for value received, for a tract of land in the county of Rutherford, State of Tennessee, bearing compound interest from 1st December, 1856. This, August 26, 1856.

"[SEAL.]

F. W. FRANKLIN."

On the 5th of November, 1857, J. P. Miller, the payor, assigned the note to Wm. A. Ransom, waiving demand and notice, for value received; and on the 1st of January, 1859, Wm. A. Ransom, for value received, assigned the note, waiving demand and notice, to Wm. C. Fletcher, the intestate of the plaintiff.

At the July Term, 1867, of the Court, the defendants craved oyer of the note sued on, set it out, with the endorsements thereon, and demurred to the plaintiff's declaration, upon the ground "that the note declared on is void in law, for the reason that it is stipulated on the face of said note, that the amount of money therein agreed to be paid shall bear compound interest from December 1, 1856, which said stipulation is illegal, and renders the note void."

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His Honor, the Circuit Judge, sustained the demurrer, rendered judgment against the plaintiff for the costs of the cause, from which judgment the plaintiff appealed in error to this Court.

Compounding interest is the charging of interest against a debtor upon a sum which has accrued as interest upon the principal debt. This is not allowed by law, except in cases where the debtor expressly contracts to pay it. If the debtor, at the time of contracting the debt, agree to pay interest upon interest, such a contract is not illegal. At the time of the creation of the debt, the creditor may stipulate with his debtor for the payment of the interest thereon at stated periods, with the condition expressed upon the face of the obligation for the debt, that if the interest is not paid at the times stipulated for its payment, it should thereafter bear interest. Or separate notes for the interest upon the debt might lawfully be taken, to fall due at the periods at which the interest upon the principal debt would amount to the sums for which they were severally given; and such notes, if not paid when they fell due, would bear interest, and would be enforced in our courts, as executed on a good and sufficient consideration. In either case, the promise would be to pay only the amount that would be due to the creditor, for interest at the time at which the debtor was bound by his contract to pay it. So that there would be upon the face of such contracts no obligation or promise to pay more than legal interest upon the sum due, and therefore an agreement to pay interest upon interest is neither illegal nor usurious.

Usury is taking by the lender from the borrower, or

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by the creditor from the debtor, more than six per cent. per annum for the use of money; and it is insisted by defendants that the note sued on in this case is an obligation of this character, and that it is therefore illegal and void.

It therefore becomes necessary to construe the instrument sued on in this case.

The mutual intention of the parties to the instrument or contract is the great, and sometimes difficult object of inquiry, when the terms of it are not free from ambiguity. To carry that intention into effect, the law, when it becomes necessary to do so, will control even the literal terms of the contract. Many cases are given in which the plain intent has prevailed over the strict letter of the contract.

If the language employed in the contract is of equivocal meaning, or susceptible of two interpretations, one of which would make it legal, and the other illegal, that construction should be accepted which would make it legal. These rules of construction prevail alike in courts of law and of equity, and apply to all written contracts, whether they are or are not under seal.

The \$4,300 for which the note was executed, is the principal. As written, the promise is to pay "\$4,300, bearing compound interest." Yet it is manifest that it was not the intention of parties that "compound interest," which refers to a mode rather than a rate of computation, should be calculated on the \$4,300. The terms "compound interest," by their legal signification, preclude their application to interest arising from the principal debt. They do not mean any *rate* of interest, legal or

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illegal, upon the principal debt; but mean interest arising from interest previously accrued, in contradistinction to simple interest, which arises directly out of the principal debt.

We hold that the proper construction of the note sued on is, that it is a promise to pay \$4,300 on 1st December, 1866, with interest from December 1, 1856, which interest is to be compounded at the end of every year, and become principal, and bear interest. We hold, therefore, that the note sued upon is not, upon its face, illegal or usurious, and that the Circuit Judge erred in sustaining the demurrer.

Let the judgment be reversed, and the cause remanded for further proceedings.

FREEMAN, J., dissented.

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APPEAL PRACTICE. *Motion to dismiss. When to be made.* Appeal prayed, but bond given after the time allowed, a motion to dismiss the appeal at the fourth term after the record is filed, comes too late.

Case cited: *Gillespie v. Goddard*, 1 Heis., 777.

FROM CANNON.

Motion to dismiss entered by JAS. S. BARTON.

J. L. FARE, for appellant.

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NICHOLSON, C. J., delivered the opinion of the Court.

Defendants move to dismiss the appeal because the appeal bond was not executed until the expiration of the time allowed by the decree for giving bond.

The decree was rendered on the 23d of August, 1867, allowing complainant until the second rule day, which was the first Monday of October, 1867, to give his appeal bond. The bond was not executed until the 17th of October, 1867. The transcript was filed in this Court on the 30th of October, 1867. It follows that the cause has been here for three full terms, and the motion to dismiss is now made at the fourth term, when the complainant would have no right to file the transcript for writ of error, if the appeal should be dismissed. The motion comes too late. This Court held, at Knoxville, in the case of *Gillespie v. Goddard*,¹ that irregularities in bringing up cases on appeal were waived, unless the motion to dismiss was made at the first term after the filing of the transcript. Of course this rule would be relaxed upon good cause shown for not making the motion at the first term. In this case, the motion is not made until the fourth term, and must be disallowed. The cause will be tried on its merits.²

¹ 1 Heis., 777.

² See S. C., *post* 68.

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WM. B. YOUNG v. C. M. DONALDSON *et al.*

1. RETURN ON EXECUTION. *Insufficient. Motion for. Satisfaction.* No judgment by motion will be rendered for a false or insufficient return of an execution upon which the plaintiff has entered satisfaction, in the absence of any proceeding or evidence to attack the entry.
2. JUDGMENT BY MOTION. *Satisfied Execution.* Where, at the time of the motion, nothing is due on the execution, there is no sum for which to render judgment, or on which to compute damages.¹
Chaffin v. Crutcher, 2 Sneed, 360, explained and approved; *Smith v. Vanbibber*, 1 Swan, 110, cited.
3. WAIVER. Waiver of right to judgment for official default.² *Barnes v. White*, 2 Swan, 442; *Trigg v. McDonald*, 2 Hum., 389; *Wright v. Johnson*, 3 Sneed, 407, cited.

MOTION IN THIS COURT.

M. M. BRIEN, for the plaintiff.

ED. BAXTER, for defendant.

SNEED, J., delivered the opinion of the Court.

This is a proceeding by motion in this Court against the Sheriff of Davidson County and his sureties upon his official bond, for an insufficient return. On the 10th of June, 1868, a writ of *venditioni exponas* issued from this Court, directing the sale of a tract of land which had been levied on by virtue of an execution upon a judgment rendered in this Court on the 16th of February, 1869, for \$862.50 and costs, in the case of *William*

¹See *Dunnaway v. Collier*, ante p. 10.

²*Ibid.*

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B. Young v. A. Creal. The process came to the hands of one of defendant's deputies, who made return thereof as follows: "Came to hand June 15, 1868, and executed by levying the same upon the within described property, and selling the same on the 12th of September, 1868, at the Court-house door, in the city of Nashville, for sixty dollars and sixty-five cents, to Mary J. Creal.

[Signed]

M. C. AUSTIN, *D. Sheriff*".

On the 2nd of October, 1868, the plaintiff undertook to redeem the land, in pursuance of the provisions of the Code, section 2128, by bidding the amount of his debt, paying the costs and refunding to the purchaser the amount bid by her, and the following memorandum was written by him upon the back of the writ:

"NASHVILLE, Oct. 2, 1868.

"I this day raise the bid on the land sold, to the full amount of my debt, or balance of same, and cost; that is, I bid for the land nine hundred and forty-four dollars, the principal and interest of my debt to the 12th of September, 1868, and cost of suit. I have paid the cost, and directed the clerk to refund to Mrs. Creal the amount of her bid. WM. B. YOUNG."

The question of law arises upon the effect of this proceeding on the part of the plaintiff. It was an attempt to redeem the land, which, under the statute, any *bona fide* creditor had a right to make. Though irregular and inartificial, we do not pronounce upon its validity, and such a question cannot be considered in this form of proceeding. The Code authorizes a judgment by motion for a false or insufficient return of an exe-

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cution, for the amount due upon such execution, and twelve and one half per cent. damages—§ 3594.

The insufficiency of the return is not disputed in this case; but it is urged that there is nothing due the plaintiff, he having satisfied the writ by the full amount of his debt.

The remedies against Sheriffs and other officers, for official misfeasance or malfeasance, should be rigidly enforced; but this peculiar remedy, summary, harsh, and in derogation of the common law, being very susceptible of abuse, and which may be converted into a most facile instrument of injustice, must be confined within the limits marked out by the law. "The liability of the officer," said Judge Totten, "must not be arbitrary, but must depend upon the truth and justice of the case. He must be held liable only for the amount due upon the execution." *Smith v. Vanbibber*, 1 Swan, 110. If he is in default by non-return, or false return, or insufficient return, he becomes liable for the debt, interest, and the twelve and one-half per cent. damages. But the plaintiff may lose his remedy by giving his sanction and ratification to the misfeasance of the officer, and by taking benefit and advantage under it.

We can look only to the execution to ascertain what is due the plaintiff; and the inquiry is, what is due him at the moment he invokes the judgment of the Court. In looking to the execution, we find that the debt is satisfied and discharged; there is nothing due. The plaintiff has undertaken to secure his debt by a redemption of the land. The execution does not inform us whether or not he was successful, and in this proceeding we can

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not inquire. The time allowed for redemption has expired. He may be in the possession of the land, for aught we know, at this moment, claiming and holding under this proceeding in full discharge of his execution; or, if evicted by paramount title, he has not shown it, and we have nothing before us but a satisfaction of the writ under his own sign manual. Upon a proper proceeding, perhaps, the satisfaction might be set aside, and the motion for the debt, interest and damages, might be sustained.¹ But such a case is not presented. It is clear that the plaintiff must fail upon his motion, for the debt and interest; and it remains to be considered whether his right to the twelve and a half per cent. damages attaches upon the proof of the insufficient return. If the plaintiff, by his sanction and ratification of the return, has waived his right to this motion for his debt and interest, upon what principle can he demand the damages fixed by statute for the insufficient return? The damages are in the nature of a penalty for an official default, and are to be measured by the amount due at the time of the judgment. The motion lies, in the language of the statute, for the amount *due upon such execution, and twelve and one-half per cent. damages.* There must be some amount due on the execution upon which the damages are to be estimated. It has been held by this Court, that the tender of the amount due on the execution, after notice, but before judgment, is no ground of defense against the motion. The failure to return according to law fixes the liability of the officer,

¹ See *Lane v. Marshall*, 1 Heis., 30; *Swaggerty v. Smith*, *Ib.*, 403.

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which can not be discharged by a tender. *Chaffin v. Crutcher*, 2 Sneed, 360. This doctrine we do not controvert. The plaintiff has a right to his damages of twelve and one-half per cent. The officer's liability had attached. The plaintiff could not be compelled to relinquish his right by an acceptance of the tender. But if he had accepted the tender, and satisfied the execution, there would have been nothing due upon which an estimate of the damages could be made. We apprehend that no court, in such a case, would have given judgment for damages. We would take it as an exceeding hardship, which can find no sanction in sound authority, and certainly none in the instincts of justice, if an officer, ignorant of the forms of law, had made a return, which, however inartificial and insufficient in law, had nevertheless, resulted in satisfying the plaintiff's debt, and yet, for his harmless blunder, he should be subjected to the penalty prescribed by the statute, of paying to the plaintiff twelve and one-half per cent. for doing him the favor of collecting his debt. And that is precisely this case. Upon examination of the authorities, it will be seen that it is only in cases where the debt or a part of it is due at the time of the motion that the damages are given. Thus, in the case of *Barnes v. White*, 2 Swan, 442, it is held that the fact that the plaintiff in a judgment, has an alias execution to issue, and receives a partial payment of his judgment after the Sheriff has rendered himself liable by an insufficient return of the first execution issued, is no waiver of the right to have judgment by motion against the Sheriff for *the remainder* of the judgment, and the damages given by statute.

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The plaintiff in this case, having adopted the return—having by his solemn admission here of record, acknowledged the payment of his debt—cannot now be heard after the lapse of more than two years, to complain. He has waived his right to do so by his deliberate sanction of the act of the Sheriff, and by taking a benefit under it. This doctrine of waiver was carried much farther in the case of *Trigg v. McDonald*, 2 Hum., 389, which was a case of false return. In that case, the Sheriff made part of the money, and paid it to the plaintiff's attorney.¹ "It is laid down," said Judge Green, "in the book heretofore quoted—Watson on Sher., 204—that if a Sheriff return that he has levied part only of the sum directed to be levied on the *fi. fa.*, the plaintiff, by receiving the money which the Sheriff returns that he has levied, waives his action against the Sheriff for a false return." *Et vid.*, *Wright v. Johnson*, 3 Sneed, 407.

If then there be no debt, how can the plaintiff take his judgment for damages? The damages are the incident of the debt—they spring out of it and are computed upon it. The plaintiff has seen proper to satisfy the writ and thus waive his right to a motion for the debt; and as the law entitles him to what is due at the time of the rendition of the judgment, and twelve and one-half per cent. damages thereon, it follows, as a logical consequence, that if there be no debt there can be no damages.

This cannot be assimilated to a case where only a partial payment has been made, or even to a case where the

¹See *ante*, *Dunnaway v. Collier*, p. 10.

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whole has been paid into the hands of the Clerk. In the first case the plaintiff would unquestionably be entitled to the motion for the balance, and his damages thereon; and in the latter, he would have his election to waive his rights and accept the money, or to decline it and proceed against the officer for the whole debt and damages thereon. But in a case like this, where the plaintiff has adopted and ratified the insufficient return, and has, according to the record, taken benefit under it to the extent of the full satisfaction of his judgment and interest, and thus in a manner assured the impunity of the officer, and for more than two years led him to believe that the debt was satisfied, he must be held to have waived his right and can take nothing by his motion. For these reasons the motion is disallowed.

HENRY MCBROOM, Adm'r of ISAAC MCBROOM, dec'd,
v. HENRY A. WILEY, ISAAC B. YOUNG *et al.*

1. CONFEDERATE TREASURY NOTES. *Returned in course of dealing to the party who once held them.* Confederate money having been collected and paid into the office of the Clerk of the Court, the plaintiff refusing to receive it, the defendant, Young, applied to borrow it, and give security, when the plaintiff said if they were *mind* to take it, it was all right, * * * but he would not take the money; thereupon Young took the money and executed the note sued on, with surety. Young had previously paid the same money to the defendants in the execution, they paying it to the Sheriff, Young received it again as a loan. Held that he and his surety were liable for the full amount of the note.¹

¹See *Rankin v. Craft*, 1 Heis. 711.

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2. CHANCERY PRACTICE. *Election.* A defendant in equity who has required the complainant to elect which of two suits he will proceed in, and has obtained a dismissal of the suit at law on such election, will not be allowed to object to the jurisdiction in equity.

FROM CANNON.

In the Chancery Court at Woodbury, Hon. BARCLAY TILLMAN presiding.

J. S. BARTON, for complainant.

J. L. FARE and M. M. BRIEN, JR., for defendants.

NELSON, J., delivered the opinion of the Court.

Isaac McBroom, in his life-time, recovered a judgment, in the Circuit Court of Cannon County, against the defendants, Webb & Wiley, for about two thousand dollars and costs. Execution was issued thereon to the Sheriff of said county, who collected the same before the return term, in the ensuing February, in Confederate Treasury notes, and, on the day of collection, paid the amount into the hands of the Clerk of said court. McBroom was a Union man, and had no confidence in that currency. It would seem, from the testimony, that he was unwilling to receive, but afraid to refuse it; that he allowed it to remain for a short time, in the Clerk's office, and never did actually receive it into his own hands; that he was notified, or requested, by John A. Wood, the Deputy Clerk, to go to the office and receive the notes which had been collected, but was unwilling to do so, and said he would not take it unless compelled; that the debt due him had been incurred for a valuable tract of land, and was the largest debt he had. Among others,

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he consulted his relative, Wm. Barton, on the subject; and, without here detailing their conversation, it will suffice to state that the defendant, Young, understanding that the Confederate money was in the office, and that McBroom had refused to take it, informed Barton that "if he would receive the money from Webb & Wiley, he would take it off his hands and give his note for it, with defendant, B. L. McFerrin, as surety." This conversation was communicated by Barton to McBroom, who said that "if they were *mind* to take it, it would be all right; that the note proposed was good, but that he himself would not take the money." In pursuance of this understanding, Young "got the money;" and, on the 11th of December, 1861, executed his note therefor, payable to McBroom, with McFerrin as his security; and McBroom executed his receipt to the Clerk. On the 3d of September, 1862, Isaac McBroom departed this life, and complainant, having been duly appointed administrator of his estate, instituted his action on the note against Young & McFerrin, in the Circuit Court of Cannon. They pleaded, in substance, that the note was founded upon an illegal consideration, and that the amount therein stipulated to be paid was not recoverable. Pending the action at law, complainant filed this bill against Wiley, Webb, Young and McFerrin, presenting his case on various grounds, not necessary to be here stated, (among others, that the record of the proceeding in his case against Webb & Wiley was lost,) and praying for discovery, and specific as well as general relief. A special demurrer was filed to the bill, and sustained by the Chancellor, at October Term, 1866. From this decree, dismissing the bill without

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prejudice, complainant prosecuted his appeal to this court, and, on 30th of January, 1867, a decree was here pronounced, in which it was declared that "it appeared to the Court, from the allegations in the bill, that the alleged satisfaction of the judgment recovered by Isaac McBroom, in his life-time, against Webb & Wiley, in the Circuit Court of Cannon county, was the real consideration of the note in controversy in this cause, and that the payment of the Confederate money was only colorable. The Court is, therefore, of the opinion, (continues the decree,) that a court of equity, looking at the substance of the transaction, would disregard the payment of Confederate money, and set up the real consideration of the note; and, in that respect, sustain the argument; (?) and the Court, being also of opinion, in view of the statements of the bill, that the remedy at law was not without embarrassment, and that the ruling of the Chancellor was erroneous," etc., the case was remanded, to the end that the defendants should be compelled to answer, etc.

After the cause was remanded, the facts were substantially found, as hereinbefore recited, and as charged in the bill, with the exception that there is nothing in the case to implicate Webb & Wiley as conspirators with Young to compel McBroom to receive Confederate Treasury notes in payment. It is more than probable that the statement in their answer, although not evidence against Young, explains the whole transaction. They state that Young was indebted to them, in a considerable amount, for stock they had sold him; and that after the execution against them, in favor of McBroom, went into the Sheriff's hands, they were anxious to get the money to pay it, and did get

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the Confederate Treasury notes from Young and paid them to the Sheriff in satisfaction of the execution. The bill charges that these identical notes were borrowed by Young, in the manner above stated, immediately after their payment. Young, in his answer, insists that the two transactions were separate and distinct, but states that he does not know when he made the payment to Webb & Wiley, and that they were not present when, as he alleges, he borrowed the Confederate notes from McBroom. He admits that he was indebted to them for stock, and says he paid them Confederate money for it whenever they called for the same; that he knew nothing of their indebtedness to McBroom; and does not remember whether he made payment at the issuance of said execution, or any time thereafter; but is satisfied that, from time to time, he did pay them over the amount of the judgment. William Barton states, in his deposition, that, after he had the conversation with McBroom, in which the latter said he would not take the Confederate notes, unless compelled to do so, "he, Barton, saw defendant, Isaac Young, and had a conversation with him; that Young said he wanted some money, and told him (Barton) that there was some money in the Circuit Court Clerk's office—Confederate money paid by Webb & Wiley, on a judgment in favor of Isaac McBroom, which he refused to take; that he (Young) wanted money, and that if McBroom would take this money from Webb & Wiley, he would take it off his hands and give his note for it, with McFerrin as surety," as already stated. J. P. Henderson states that he was present when Young executed his note, 11th December, 1861; that McBroom was also present; that he

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does not remember seeing McBroom handle the money; and that it was counted by Barton, who says that he had counted it previously at the Clerk's office.

It is manifest from the evidence of these witnesses, and Young's statement in his answer, as to his own want of recollection, that some of the most material facts have escaped his memory, as might well be the case with one engaged in active business and having frequent transactions of similar character. But, upon the evidence of said witnesses, corroborated by other facts and circumstances in the case, we are of opinion that as McBroom never assented to the collection of his judgment in Confederate notes, or ratified its collection in any other mode than by loaning them to Young; and as Young, in all probability, received the same money back that he had paid to Webb & Wiley, and voluntarily promised that if McBroom would receive it, he would take it off his hands and give his own note with security; the whole transaction was, in the language of the decree upon the demurrer, "merely colorable," and that the satisfaction of the judgment was the real consideration of the note in controversy. In other words, we are satisfied that, upon the special facts of this case, Young being justly indebted to Webb & Wiley, and they to McBroom, and the latter having executed a receipt for the amount of his judgment and execution at Young's instance—the latter, in the view of a court of equity was, upon valid consideration, substituted in the place of Webb & Wiley as debtor to McBroom, and is bound in equity, and good conscience, to pay the full amount of the note executed by him to McBroom.

There is no proof in the record that the consideration

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of the debt to Webb & Wiley was horses sold, to be used by the Confederate Army, or that McBroom loaned his money to be used in any unlawful contract or enterprise; and we cannot order the case to be tried in the Circuit Court, as insisted in the brief and arguments of defendants, with the view of investigating such alleged circumstances. Were we in doubt as to our duty in the premises, we are precluded from complying with the suggestion by the conduct of the defendants themselves, for the following entry appears to have been made of record in the Chancery Court, on 17th of February, 1868, to-wit: "In this cause, upon motion of defendant, the complainant agrees to elect to prosecute his action in this Court; and his action of debt in the Circuit Court of this county aforesaid (against) defendants Young and McFerrin, shall stand dismissed; and it is so ordered by the Court."

The decree of the Chancellor will be reversed, and a decree pronounced here against the defendants, Young and McFerrin, his security, for the amount of principal and interest due upon the note, and the costs in this court and the court below.

Mayor and Aldermen of Winchester v. D. R. Slatter.

MAYOR AND ALDERMEN OF WINCHESTER v. D. R.
SLATTER.

1. AGENT. *Suit for Compensation. Proof to Sustain.* An Agent; as a Tax Collector, suing for commissions, must show, as a condition necessary to a recovery, that he has fully performed the duties of his agency.

FROM FRANKLIN.

Appeal from the Circuit Court, N. A. PATTERSON, J.,
presiding.

A. S. MARKS, for the plaintiff in error.

M. F. TURNEY, for defendant.

NICHOLSON, C. J., delivered the opinion of the
Court.

In September, 1860, Slatter was appointed Collector of the taxes for the corporation of Winchester, by the Board of Mayor and Aldermen, of which Board he was a member. He held the office until September, 1861. During the year he was in office, he collected taxes amounting to about \$1,000, which he paid over to the Treasurer of the Board. The last payment so made was in April, 1861; from that time till September, 1861, when he ceased to be collector, he made no payments into the corporation treasury.

In September, 1866, Slatter sued the corporation before a Justice of the Peace, on account for services as Collector. He obtained judgment; and, on appeal to

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the Circuit Court, there was verdict and judgment in his favor, for \$70, from which the corporation appealed in error to this Court.

Besides the facts already stated, it appears from the bill of exceptions, that the annual taxes collected for the corporation of Winchester amounted to between \$1,500 and \$2,000. It further appears that Slatter had made no settlement of his agency with the corporation, and that the tax books, for 1860, were in his possession when last heard of. In this state of the facts the Circuit Judge charged the jury, that, "if the plaintiff has shown, by proof, services rendered for defendant, and fixes the amount, by contract or reasonable worth, his suit here puts the laboring oar on the defendant's to resist by proof, the obligations generally; or, by proving payment; or, that the plaintiff, by failure or negligence, is properly liable, under the forms of a cross action."

In giving his charge, the Judge seems to have overlooked the fiduciary relation which existed between the plaintiff and the defendants. This relation imposed special duties on the plaintiff, which were required to be performed by him before he could claim his commissions. "The general rule of law, as to commissions, undoubtedly is," says Mr. Story in his work on agency, sec. 329, "that the whole service or duty must be performed before the right to any commissions attach, ordinary or extraordinary; for an agent must complete the things required of him before he is entitled to charge for it, unless the entire performance should be prevented by the act or negligence of the principal him-

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self. Again, in sec. 331, he says: "The agent is entitled to his commissions only upon a due and faithful performance of all the duties of his agency in regard to his principal. For it is a necessary element, in all such cases, that, as the commissions are allowed for particular services to the principal, it is a condition precedent to the title to the commissions that the contemplated services should be fully and faithfully performed. If, therefore, the agent does not perform his appropriate duties, or if he is guilty of gross negligence, or gross misconduct, or gross unskillfulness in the business of his agency, he will not only become liable to his principal for any damages which he may sustain thereby, but he will also forfeit all his commissions."

Instead, therefore, of charging the jury, as the Judge did, that if the plaintiff had shown, by proof, that he had rendered services for the defendants, the laboring oar was put on the defendants to resist a recovery; he ought to have told them, that, as the plaintiff was the agent of the defendants' to collect and account for the taxes assessed, he was bound to show that he had fully and faithfully performed his duties before he could claim his commissions.

For this error, in the charge, the judgment will be reversed, and the cause remanded for a new trial.

P. F. Tedder v. C. C. Odom *et al.*

P. F. TEDDER v. C. C. ODOM *et al.*

SALE. *For illegal purpose.* Knowledge of a purpose to put property to an illegal use, without more; as where a horse was bought to be used in the Confederate service; does not affect the seller with the illegality, so as to bar his right of recovery of the price.¹

Naff v. Crawford, 1 Heis., 116.

FROM CANNON.

Appeal from the Chancery Court at Woodbury. B. M. TILLMAN, Chancellor.

J. L. FARE and M. W. McKNIGHT, for complainant.

JAMES S. BARTON, for defendants.

NICHOLSON, C. J., delivered the opinion of the Court.

This is a bill to enjoin the collection of a judgment, rendered on the 16th of September, 1862, by a Justice of the Peace, for Cannon County, on a note for one hundred and fifty dollars. Complainant, being about to enter the cavalry service of the Confederate States, purchased of one of the defendants, a horse, to be used in that service. The proof is abundant that the horse was purchased for that purpose, and that complainant was fully cognizant of the object of the defendant in making the purchase. Complainant required the defendant to

¹See S. C., *ante*, 50.

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give his note, with two sureties, for one hundred and fifty dollars, which was the full value of the horse.

This note was sued on before a Justice of the Peace, when the payor and his sureties suffered judgment to be rendered without making any defense. Execution issued and was levied on the land of one of the defendants, and upon its being condemned for sale this bill was filed, making substantially the allegations recited, and an injunction was granted to stop the sale. The defendants submit to the jurisdiction and answer the several allegations of the bill with a good deal of evasion, such as denying positively that a horse was sold, to be used in the Confederate service, but admitting a mare was sold; but insisting that she was not fit for the cavalry service; and denying that the consideration of the note was illegal.

The proof, as already stated, fully establishes the fact that complainant bought the mare for the purpose of using her in the Confederate cavalry service, and that she was so used, and that the defendant knew the purpose for which she was bought. But the proof fails to show that the defendant's object in selling was to promote the Confederate cause. He sold for a full price, exacted two sureties to the note, and most probably was looking only to his own interest, and not to that of the Confederacy, in making the sale.

That such a contract was not illegal on the part of the defendant, was decided by this Court at its recent term, in the case of *Naff v. Crawford*, 1 Heiskell's R., 116. The rule laid down in that case is, "that the *agreement* must be to do, or to further, some illegal or immoral

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purpose in violation of public policy. The element that destroys the validity of the agreement is the purpose, by the agreement to effect or aid the forbidden end, or else the consideration for the promise must have been to do and perform an illegal or immoral act." The proof discloses no such element in the contract on the part of the defendant. He did not agree to sell the horse in consideration that complainant would use him in the Confederate service, but in consideration that complainant would give to him his note for \$150 with two securities. The rule which governs the case is aptly illustrated by Mr. Story in his work on Contracts, vol. 1, § 541, in which he says: "So also, a lease of lodgings for the purpose of prostitution, is void. But the mere fact that the person to whom the board or lodging or any articles are furnished, is a prostitute, does not invalidate the contract therefor, unless *the very object* of the agreement be to pander to her prostitution." As we do not think the proof shows the object of the defendant to have been to aid the rebellion, but simply to convert his mare into a good note for his private purpose, we hold that the bare knowledge on the part of the defendant that complainant intended to make an illegal use of the horse, does not vitiate the note.

The decree below is affirmed, with costs.

Bettie V. Sandford v. J. S. Weeden, Adm'r, etc.

BETTIE V. SANDFORD v. J. S. WEEDEN, Adm'r, etc.

1. RESULTING TRUSTS.¹ *Kinds of, distinguished.*

1. When one person having the funds of another, invests them without direction of the owner, in property, and takes the title to himself, a trust results.

2. So, when a trustee, having a trust fund, agrees with the beneficiary to invest them in real estate, and does so, taking the title to himself. *Turner v. Pettigrew*, 6 Hum., 438.

3. Where funds are in the hands of a trustee, with agreement to invest them in specific property. If that property is purchased, the law raises the presumption that the fund was used, and raises the trust.

2. SAME. *Statute of Frauds.* Neither of these is within the prohibition of the statute of frauds.

3. SAME. *Quantum of Proof.* The proof to raise a resulting trust must be such as fully to satisfy the Court of the facts upon which the result depends.

4. SAME. *Husband and Wife.* A husband agreeing at the time of a sale of a wife's land, to invest proceeds in other lands for her benefit, and making such investment, taking the title in his own name, is held to be a trustee for the wife.

5. SAME. *Estoppel.* A failure to set up a resulting trust in a bill for divorce, will not estop a wife from setting it up afterwards.

6. SAME. *Creditors of Trustee.* The right of the beneficiary in such case, is superior to the right of creditors of the trustee.

7. EVIDENCE. *Witness.* The fact of a witness releasing an interest, is a circumstance to show his leaning.

Cases cited: *McCammon v. Pettitt*, 3 Sneed, 242; *Thomas v. Walker*, 6 Hum., 93; *Turner v. Pettigrew*, Ib., 438; *Gass v. Gass*, 1 Heis., 613; *Click v. Click*, Ib., 607.

FROM CANNON.

CHARLES READY & M. W. MCKNIGHT, for complainant. Mr. R. cited *M. E. Church v. Jaques*, 1 Johns

¹See *Snell v. Elam*, post.

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Ch. Rep., 450; *Ex parte Yarbrough*, 1 Swan, 202; *Ready v. Bragg*, 1 Head, 511; *McCammon v. Pettitt*, 3 Sneed, 242; *Dudley v. Bosworth*, 10 Hum., 9; *Coleman v. Satterfield*, 2 Head, 259; *Powell v. Powell*, 9 Hum., 492.

On the right of creditors, he cited 2 Sto. Eq. Jur., §§ 1372, 1373, b.; *Moses v. Murgatroyd*, 1 J. C. R., 119, 128; *Kipp v. Bank of N. Y.*, 10 Johns. R., 63; *Dexter v. Stewart*, 7 J. C. R., 52; *Bullard v. Briggs*, 7 Pick., 533; *Earl of Plymouth v. Hickman*, 2 Vern., 167; *Thomas v. Walker*, 6 Hum., 93; *Ready v. Bragg*, 1 Head, 511.

J. L. FARE & J. S. BARTON, for respondent. Mr. Fare cited *Brown v. Brown*, 6 Hum., 129; *Woods v. McGavock*, 10 Yer., 136; 1 Meigs' Dig., 1063; Acts of 1785, c. 12; 1801; Meigs' Dig., § 1010, 1012; *McCammon v. Pettitt*, 3 Sneed, 242; *Trigg v. Read*, 5 Hum., 551.

Mr. Barton cited *Cooley v. Steele*, 2 Head, 605; *Barham v. Turbeville*, 1 Swan, 437; *Ready v. Bragg*, 1 Head, 511.

NICHOLSON, C. J., delivered the opinion of the Court.

In 1854, Elizabeth R. Sandford intermarried with George W. Thompson. At the time of the marriage, she was the owner, in her own right, of a valuable tract of land of 325 acres, situated in Cannon County, together with slaves and other personal property. She was a widow, with one child, Bettie V., the complainant. George W. Thompson had but little property, if any, besides two or three horses. In November, 1855, Thompson and his wife sold and conveyed the land for \$14,725, to M. R. Rushing. The proceeds of the land were

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received by Thompson, who invested them in other lands and in personal property. In 1859 Mrs. Thompson died, leaving complainant her only heir; and in 1860 Thompson died, leaving no children. Defendant, Johu W. Weeden, administered on his estate, and entered upon its administration; but finding that the personal assets were insufficient to pay the debts, he filed an insolvent bill for the sale and distribution of the proceeds of the lands amongst the creditors, who are thereby made defendants to the bill of complainant. Bettie V., by her next friend, files her bill, claiming that her mother, Elizabeth R. Thompson, died the owner, by resulting trust, of all the real and personal estate purchased with the proceeds of the land sold to Rushing; and that as the only heir of the said Elizabeth R., she is entitled, by descent, to all of said property. The heirs of Thompson were originally defendants, but have acquiesced in the decision of the Chancellor against them; so that the contest here is made alone between Bettie V. and the administrator and creditors of Thompson.

The allegations in the bill by which the contest is raised, are, that prior to his marriage with complainant's mother, Thompson formed the scheme of first marrying her, and afterward procuring the title to her lands by inducing her, by false promises, to join with him in a sale of the land owned by her, and then vesting the proceeds of the sale in other lands and personal property, and having the titles made in his own name. It is further alleged that this fraudulent scheme was consummated by falsely promising her mother that if she would consent to a sale of her land, he would vest the pro-

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ceeds in other lands and take the title in her name. And that her mother, confiding in this promise, did join him in the sale to Rushing, but that he fraudulently vested the proceeds in other property, real and personal, and took the titles to himself. It is further alleged, that she was addicted to the excessive use of opium, and that when under its influence she was easily influenced by her husband.

The administrator answers, and denies, on information, the material allegations of the bill, thus making up the issue.

There can be but little controversy at this day, especially in our State, as to the questions of law which control cases of this kind. The real contest in this, as in most similar cases, is as to the facts. We will first state the principles of law applicable to the case, and then examine the facts, to ascertain whether they bring the case within the principles of law laid down.

1. The ordinary and simple form of resulting trust, is, when one person, having the funds of another in his possession, without any agreement with the owner of the funds, vests them in property, and takes the title to himself. The law in such cases implies a trust, and holds that the trustee has the naked, legal title, whilst the real ownership is in the person whose money paid for the property. Fonbl. Eq., 401, top p., and note; 1 Lead. Cas. Eq., 200, 203, and authorities cited; Hill on Trust., 141, top p.

2. Another species of resulting trust is, when a trustee of any kind, has in his possession, trust funds, and agrees with the *cestui que trust* to invest them in real

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estate generally. If he does vest them in real estate, taking the title to himself, the owner of the funds has a resulting trust, which he may enforce, either by electing to take the land, or he may enforce his lien against the land for the money. 1 Lead. Cas. Eq., 195, 204, and authorities cited; *Turner v. Pettigrew*, 6 Hum., 438; Fonbl. Eq., 423, note; Hill on Trust., 142.

3. There is another species of resulting trust, where funds are placed in the hands of a trustee, under an agreement to be vested in specific property. In this case, if the specific property is purchased, and the title taken in the name of the trustee, the law raises a presumption that the funds of the *cestui que trust* were used in the purchase; and upon this presumption a resulting trust is raised, which may be enforced at the election of the *cestui que trust*, either by having the title divested out of the trustee, and vested in the *cestui que trust*, or by enforcing the specific lien against the land. 2 Lead. Cas. Eq., pt. 1, p. 560, 561; 1 Fonbl. Eq., 424, 5, notes; 1 Brown's Ch. R., 507; Adams' Eq., 116, top p.

In the first species of resulting trust, it has been held, but upon reasoning not very satisfactory, that the owner of the fund can only enforce the trust by recovering the property itself. In the other two species, the *cestui que trust* has an election to take the property, or to follow the money by enforcing the lien on the property. 1 Lead. Cas. Eq., 203, and authorities cited. [Ed. of 1859, p. 276.]

It is well settled, that neither of these kinds of resulting trusts is embraced by the statute of frauds, 29 Charles 2, c. 3, and therefore there is no controversy as to the admissibility of parol proof for their establishment

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and enforcement. Different Judges have employed different language in declaring the character and weight of the proof, which is necessary and sufficient to set up a resulting trust. The result of all the attempts to define the rule as to the amount of parol proof necessary in such cases, is, that the conscience of the Court should be fully satisfied that the facts relied on to raise the trust are true, and sufficient to create the trust. Hence, in the first species of resulting trust, the proof, whether parol or written, must be such that the Court is fully satisfied that the funds of the *cestui qui trust*, and not the funds of the holder of the legal title, was used in the purchase of the property. So, also, as to the second species, the proof must fully satisfy the Court that there was a definite agreement between the *cestui que trust* and the trustee as to the investment of the funds, and the like proof as to the use of the funds of the *cestui que trust* in the investment. The rule does not require the proof to show that the identical coin and bank bills received from the *cestui que trust* were used in the investment, but that the funds used in making the investment were, in fact, the funds of the *cestui que trust*.

In the third class of resulting trusts, the rule as to amount and character of proof necessary to establish the agreement for the investment of the funds in the specific property, is the same as in the other two classes. It must fully satisfy the Court as to the definite character of the agreement. But in such case, if the specific property agreed to be purchased is actually purchased, the law presumes that the trustee discharged his trust faithfully, and used the funds of his *cestui que trust* as agreed;

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and he will not afterward be permitted to claim the property as his own, by showing that he violated his trust, and used his own money. Fonbl. Eq., 424, 5, notes; Adams' Eq., 116.

It was at one time much controverted, whether the admissions or declarations of the holder of the legal title could be proved after his death, to set up a resulting trust against his heirs, representatives or creditors; but in this country, at least, it is now the ruling doctrine, that such proof is competent against all persons claiming under such deceased trustee, except *bona fide* purchasers for valuable consideration, without notice. 1 Lead. Cas. Eq., 200, 201; *McCammon v. Pettit*, 3 Sneed, 242; Adams' Eq., 112; Hill on Trust., 149.

To determine whether the complainant is entitled to the relief prayed for, we must next turn to the proof, and ascertain whether she has shown fully and satisfactorily, that her case falls within either of the classes of resulting trusts defined.

It is proved by St. Johns, that he was on terms of intimacy with Thompson, that, after the marriage and before the sale of the land to Rushing, Thompson wanted witness to see complainant's grandfather and get hold of the original marriage contract between complainant's mother and her former husband. [It was through this contract that she obtained the property.] He, Thompson, said the grandfather had refused to give the paper up to him.. After the land was sold to Rushing, Thompson told witness that he was too sharp to let matters stand as they were when they married. He said he had managed to get the property into his

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own hands, for the reason that if his wife died the property would go to the complainant. He also said his wife would kill herself taking laudanum if she did not quit it, and he intended to do right by complainant when she got married—he intended to give her a negro, etc.

He spoke at another time of a difficulty between his wife and himself—that she was constantly annoying him about the title to the property he had bought with her means, and said he had promised her he would have the title made to her, but would not do it to please the Wharton family (his wife's family.)

Here is direct proof of an effort to get possession of the original title paper of the land, and a clear admission after the land was sold that he managed to get the property into his own hands by the sale; and the manner in which he so managed is clearly manifested when he said afterward that he had promised to make her a title to the property which he had purchased with her means. Here is an admission both of the agreement and of the application of the trust funds.

Weeden proves that Thompson promised his wife that he would have the proceeds of the land sold to Rushing invested in other lands, and have the title made to her. This was the arrangement, in the presence of witnesses, before she agreed to have the land sold. She mentioned the town property in Woodbury, and other specified lands, to be paid for out of the proceeds of the sale to Rushing. She was unwilling to sell to Rushing until this promise was made by Thompson. Witness heard a conversation between Mr. and Mrs. Thompson

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whilst they were separated, and whilst she had a bill pending for a divorce. In that conversation he admitted that he had promised to have the title of the property made to her, and he would still do so, if that would reconcile her. She thereupon dismissed her divorce suit. She claimed the town property and the other lands purchased as having been paid for with her money; and he admitted it all.

This witness was present when the agreement for the sale of the land to Rushing and the investment in specific lands was made. He proves that she was unwilling to sell until the promise was made, and that afterward Thompson admitted that he had made the promise, and had paid for the lands, specified in the agreement, with her money.

Webb proves that before and about the time of Thompson's marriage, he frequently heard him say that if he married he intended to get the title of the property in his own name; and, after the marriage and after the sale, he said he had done what he intended. He said he was too sharp to have a marriage contract—he intended to have the property in his own hands.

Mrs. Miller heard Thompson often promise his wife to give her the worth of the land sold to Rushing in other property. She proves that Mrs. Thompson took a great quantity of opium and laudanum about the time the land was sold, and when under the influence of either, she could be easily influenced.

This proof, taken all together, leaves no room for doubt that Thompson entered into the marriage with his wife for the purpose of procuring her property; and with a

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fixed design so to manage, as to become the absolute owner of its proceeds; and that he did induce her, by false promises, to consent to sell her land, with a distinct agreement that the proceeds should be vested for her benefit in the lands which he afterwards bought; nor is there any doubt, not only from his pecuniary condition, but from his frequent admissions, that the property bought was paid for with her means.

Nor do we think the proof made by defendant in any material degree weakens the force of complainant's proof. We attach but little weight to the witness, Harris. He shows himself too willing and too swift a witness to command much respect. His eagerness to defeat the claim of complainant is shown by his own declarations, as well as by his relinquishment of his interest, in order to become a witness. Nor do we think the fact that Mrs. Thompson failed in her bill for divorce, to set up a claim to the property by way of resulting trust, is such a circumstance as can be relied on, either by way of estoppel or as evidence that she had no such claim. Her object in her bill was to be released from a cruel and brutal husband; and by securing this object, she was, no doubt, advised by her counsel, that she would be restored to her property. In her bill she sets up distinctly her claim to the whole property, and her first prayer is that the Court will restore it to her. It is altogether probable that she was ignorant of her right to set up a resulting trust. Under such circumstances, we are fully satisfied, notwithstanding the proof of Harris and the allegations in her bill for divorce, that complainant has established such a state of facts, as, under the second and third clauses of

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trusts defined, entitles her to the relief prayed for; unless the creditors of Thompson have a superior equity to which her's must be postponed.

This is not an open question in this State. It was held, in *Thomas v. Walker*, 6 Hum., 93, that the equitable interest of a person, who has a resulting trust, is not affected by judgments of creditors against the holder of the legal title; in *Turner v. Pettigrew*, 6 Hum., 438, that a resulting trust will prevail against creditors who claim the property by conveyance, in trust for their security, by the holder of the legal title. And in two cases decided at the recent term at Knoxville, *Gass v. Gass*,¹ and *Click v. Click*,² it was held that it will prevail against an attaching creditor or against a purchaser at execution sale. The only party who can successfully contest this equity is a *bona fide* purchaser for valuable consideration without notice.

It follows that complainant is entitled to the relief prayed for. The Chancellor so decreed, and we affirm his decree.

¹ 1 Heis., 613.² *Ib.*, 607.

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MELISSA J. SNELL *et als.* v. THOMAS ELAM and WIFE,
et al.

1. RESULTING TRUST.¹ *Proof to Establish.* A resulting trust established upon the following facts: A father being guardian of his son, and indebted to the son, bought the land in dispute for \$3,600, and took the deed to himself, January 2, 1852, declaring to several witnesses that he had invested his son's money, and had bought the land for him. On the 5th of March, 1856, he took a receipt, as guardian, from his son, for \$853.87, purporting to be in full of the amount due the son on settlement, 13th of April, 1850, with interest to date, it being admitted at the bar by all parties, that there was no money payment; the settlement referred to being a settlement with the County Court of that date. The son had, previously to the date of the receipt, been put in possession of the land by the father. The father was indebted to the son at the time of the purchase for money actually received, \$1,791, and had appropriated negroes of the son for his own use, by which he was indebted to the son in about \$1,600 more. The father, on the 17th of November, 1861, gave a receipt to the son for all dues and demands, which could only apply to the discharge of the son for the land, and the son gave a receipt in similar form to the father, bearing even date. The father and son both died, and this litigation was between the heirs at law.
2. SAME. *Strictness of Proof. Exception.* The rule which requires strictness of proof to establish a trust may be relaxed in a case of parties who do not deal upon equal terms, as in a case between guardian and ward, where the guardian has kept no accounts, a trust will more readily be presumed.

FROM RUTHERFORD.

Appeal from the decree of J. P. STEELE, Chancellor,
in the Chancery Court at Murfreesboro.

The objection taken to the bill mentioned in the concluding sentence of the opinion, is taken in the brief of

¹See Sandford v. Weeden, *ante*, p. 71.

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Mr. Ewing. A part of the \$1,791 mentioned in the opinion, was said to have been derived by the father from lands of the son sold by him, as guardian, without legal authority; and it was objected that as to this there was no charge in the bill, other than the general charge that the land was purchased with the moneys of the son.

CHARLES READY for the complainants.

E. H. EWING, with whom was J. B. PALMER, for defendants, cited *Holder v. Nunnely*, 2 Cold., 288; *McCammon v. Pettitt*, 3 Sneed, 242; *Moffitt v. McDonald*, 11 Hum., 457.

TURNEY, J., delivered the opinion of the Court.

In 1836 or 1837, James C. Snell became entitled to legacies and distributive shares from the estate of his maternal grand parents, John and Jane Lawrence.

William Snell, the father of James C. who was then quite young, not more than four or five years of age, became his guardian, and took charge of his estate, consisting of money, land and negroes.

James C. Snell was the only child of a first marriage. By a second marriage, Wm. Snell had two children, who are defendants to this suit. Wm. Snell died in March, 1862, and James C. in March, 1863, leaving his widow, Melissa, and two children, who are the complainants.

On the 2d of January, 1852, Wm. Snell perfected a purchase of a tract of land of 206 acres, known in the record as the Featherston tract, at the price of \$3,600, taking the deed to himself.

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A bill is filed by the widow and children of James C. against the children of the second marriage of Wm. Snell, alleging that the tract of land was purchased with the money of James C., in the hands of his father, as guardian; and that he, in his lifetime, held, and defendants since his death hold, the land in trust for James C., or his widow and children, after him.

The answer denies that the purchase was made with the means of James C. It is insisted that the guardian fully paid off his ward, and gave him the land as an advancement; that is, that about \$1,791 of James' money went into the purchase, and as to the balance of the purchase money, the land was an advancement.

It is also insisted for defendants, that William fully settled with and paid his son and ward; and in support of this, two receipts are produced, one in the words:

"Received from William Snell, my guardian, eight hundred and fifty-three dollars and eighty-seven cents, in full of the amount due me on settlement on the 13th day of April, 1850; also, all accruing interest to this date. This, 5th day of March, 1856.

"[Signed]

J. C. SNELL."

The other in the words:

"Received of William Snell all dues, debts and demands against him up to this date. November 17, 1861.

"[Signed]

JAS. C. SNELL."

To support the idea of settlement and discharge, the following paper is relied upon:

"Received of Jas. C. Snell all debts, dues and demands against him up to this date. November 17, 1861.

"[Signed]

WM. SNELL."

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As additional evidence upon this point, our attention is invited to a paper, without date or signature by subscription, but in the handwriting of James C. Snell, in these words:

"I, James C. Snell, have this day given up to William Snell all my claims, as guardian, from my grandfather and grandmother Lawrence's, deceased, estate; and the said William Snell has proceeded to value his estate, and give to James C. Snell one-third of his lands and negroes: Featherston place, 206 acres, at \$30 per acre, \$6,180; Charles, \$1,000; Amy, \$800; Davy, \$1,000; Tom, \$800; Margaret, \$600; Ruth, \$600; John, \$450. The above land and negroes amount to \$11,430, besides other plunder, which property, I, James C. Snell, have received in my possession, and Wm. Snell keeps the balance to himself. The home place, 347 acres, at \$30 per acre, amounts to \$10,410; Hoover place, at \$5,000; Gabriel, \$600; Cæsar, \$1,000; Jim, \$1,000; Abram, \$1,000; Peter \$1,000; Henry, \$900; Bess, \$800; Elizabeth, \$800; Evaline, \$800; Viney, \$800; Jane, \$600; Sarah, \$700; Harriet, \$500; Betty and Andrew, \$500."

To meet these evidences, complainant insists, and it is conceded in argument by defendants, that William never paid any money to James C., but that the discharge was in the price of the land; the one insisting upon the full amount, and the other, that it was only partial and that the remainder of the investment in the land, after the extinguishment of the guardian's indebtedness, was an advancement by the father to the son.

This issue brings us to the consideration, first, of the two receipts from James to his father, and the one from

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his father to James, to ascertain their relation and purpose, to and in the matter between the parties. In doing this, it must be borne in mind that the land was purchased in January, 1852, and taken possession of by James in 1855, and his receipt for "eight hundred and fifty-three dollars and all accruing interest," was executed 5th March, 1856.

It is clear, that at this date father and son came together to settle the matter of guardianship, that they canvassed the items in general terms, and it was then and there agreed that the land should discharge the liability of the guardian. The record shows that the father was not dishonest, but loose in the keeping of his accounts; and it is almost positively certain that they intended the general receipt to embrace by intendment, the entire transaction and accountability for the guardianship, the land being the payment. The failure to show the amount of accruing interest, proves that the parties were willing to and did settle in general terms, deeming it at that time, only necessary to show upon paper an acquittance of the amount and interest mentioned, that being the amount shown by a settlement in the County Court, and being the only item existing in record or written evidence; all others, existing only in memory and parol, were deemed to be sufficiently adjusted by a parol understanding. This view is well supported by the proof of the very affectionate and confiding relations always and uninterruptedly existing between the father and the son.

We consider together, the mutual receipts of Nov. 17, 1861. They are identical in language, for "all debts,

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dues and demands to date," not indicating any amount nor referring to any particular dealings.

At the time of their execution, James C. was preparing to, and in a short time did, enter the army, leaving a family. It was doubtless his purpose, as also his father's, to close up the matters of guardianship and the payment for the land in general terms, and by these mutual receipts.

There can be no other interpretation of these receipts; and unless this is so, there is no reason for the receipt given to James. The land is the only account on which he was or could be regarded as indebted to his father.

In support of this solution we recur to the facts, that the purchase price of the land was \$3,600, and that the indebtedness in money actually received by William Snell was, according to his own showing, \$1,791 in 1852, the date of the purchase.

James had acquired, in addition to this sum, a negro woman, who had become the mother of quite a number of children. His father kept and claimed her, and several of her children, as his own property, it is said, under a swap to James of a man and woman. The proof shows, however, that James' negroes were worth about sixteen hundred dollars more than those he got in exchange. Without interest on this last amount, we are within two or three hundred dollars of the price paid for the land by the father.

Taking the calculation, with the general language of the receipts already mentioned, and the frequent declarations of the father, that he had bought the land for James, and with his means, the conclusion is inevitable

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that the settlements between the father and son, were for the single purpose of paying and receiving the land in discharge of the guardian account, and in consummation of the father's purpose in its original purchase.

The only solution to be given to the paper without date and unsubscribed, is, that, at a time anterior to the making of the mutual receipts of November, 1861, propositions of settlement had passed between the parties without acceptance; and this paper is a memorandum of an offer to settle, which was never accepted.

We have the more readily and satisfactorily arrived at a conclusion, because of the ages and twofold relationship of the parties. While it is a general principle that it must be clearly established that the property upon which the trust is sought to be fastened, has been paid for out of the specific trust fund, the same measure and strictness of proof is not required in all cases. A distinction must be made between the cases in which the parties deal upon an equality, and cases growing out of the relation of parent and child, guardian and ward, and the like.

If the father, or his estate, has sustained a loss, it is such as has been brought about by his own conduct, and of which he cannot complain. It was his duty to have kept them truly, and to have made regular settlements of his guardian accounts. In this litigation, the burden was upon him to have explained each difficulty, and failing to do so, he must suffer the loss.

For these reasons, we declare the title to the Featherston tract of land to have been in Wm. Snell, in trust for James C. The title thereto will be divested out of

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the heirs of William, and vested in those of James C. The cause will be remanded, for assignment of dower to the widow of James C. The decree of the Chancellor, directing an account to ascertain the amount paid by Wm. Snell out of his individual means, in the purchase, is reversed.

It is objected, that the allegations of the bill are not broad enough for the relief sought. Looking to the bill and answers together, we think the objection is not well taken.

J. B. TAYLOR v. SINIE TOMPKINS, Administrator; CARROLL HENRY v. SAME; SAMUEL MCWHIRTER v. SAME; ISAAC McMURRAY v. SAME.

EQUITY JURISDICTION. *Account.* A bill in equity lies for an account of goods sold on commission, if complicated, or if there be embarrassment in making proof, though the items are all on one side.

FROM WILSON.

From the Chancery Court at Lebanon, before HENRY COOPER, J.

WILLIAMSON & MARTIN and MULLOY, for complainants, cited 1 Story's Eq., §§ 66, 67, 74, 455, 458, and n. 1, 459, 462, 3, 468, 680, 690; *Pearl v. Corporation of Nashville*, 10 Yer., 179.

STOKES & SON, for defendants, cited 1 Story's Eq.

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Jur., 320, 323, 324, 458 a, 825, 9 a, 462; 10 Yer., 184; *Smiley v. Bell*, M. & Y., 378; *McLin v. McNamara*, 2 Dev. & Bat. Eq., 82; *Hough v. Martin*, Id., 379.

E. I. GOLLADAY, on the same side, cited, in addition, *Hay v. Marshall*, 3 Head, 623; 1 Story, §§ 689, 691; *Russell v. Clark's ex'rs*, 7 Cranch, 69; *Denny v. Gilman*, 26 Maine, 149; *Whiteside v. Lafferty*, 9 Hum., 30; *Overton v. Searcy*, Cooke, 36, 39, Cooper's Ed.

FREEMAN, J., delivered the opinion of the Court.

These cases were bills and amended bills, filed in the Chancery Court of Wilson county, alleging, substantially, that in 1862, complainants were induced, by the representations of Edward Tompkins, of whom defendant was executrix, to deposit with said Edward Tompkins a large amount of dry goods and other articles, of the value specified in each of the bills in these causes; that Tompkins sold said goods, some on time, taking notes for the same to himself, some for cash; that he sold many of the goods at above fifty per cent. on cost; that he sold some of said goods for Tennessee money; that said articles were sold by said Tompkins to various persons, in his life, which parties were to the complainants unknown; "and that the book of accounts kept, and the notes received by Tompkins upon said sales, have, or should have, come to the hands of defendant, as executrix;" that "a disclosure of all matters appertaining thereto, with a true and perfect inventory thereof, and all other facts connected with said consignments, sales, &c., as prayed for in the original

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and amended bills, is material to a fair and just trial of this cause, and cannot be proven in any other manner nor by any other person known to complainant.

The prayer of the bill is for full answer to all its allegations; that defendant be compelled to file with his answer a full, true, and perfect inventory of all the notes, accounts and other evidences of debt which came to her hands, describing the same accurately; and also all judgments of said Tompkins and parties defendant thereto. They then pray for an account of the sale of said goods, fraudulently or otherwise appropriated by him, or disposed of by his executrix; and that the estate of said Tompkins be held liable for the value thereof, and for general relief.

These bills and the amended bills, were demurred to and the demurrers sustained by the court; from which decree there is an appeal to this court.

The demurrer was for the following causes:

1. No equity in bill, the matters not being relievable in a Court of Chancery.

2. That if the allegations of the bill entitle the party to any relief, it is to be administered at law.

3. That defendant is not bound to answer and disclose as requested, the bill not being a bill of discovery, etc.

We think the Chancellor erred in sustaining the demurrers in these cases.

We hold, the allegations of the bills and amended bills clearly make out such a case of account as gives the Court of Chancery jurisdiction. While it is some-

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times rather loosely said that equity will not take jurisdiction where the items of the account are all on one side, yet there are many cases of complication or of embarrassment in making out the proof of the debt claimed, and which is sought to be ascertained by the proceeding in equity, where the relief given by a court of equity is far more adequate, complete and free from embarrassment than could be obtained in a court of law. We think this one of that class of cases.

Mr. Story, 1 Eq. Jur., § 462*a*, very properly says: "The bare relation of principal and agent does not of itself, entitle the principal to come into a court of equity for an account, if the matter can be fairly tried at law.

"But if the defendant, as agent, has received sums of money for the plaintiff, the particulars and amount of which are unknown to him, a bill praying for discovery and an account will be maintained—and also where the accounts are too complicated to be dealt with in a court of law, a court of equity will entertain jurisdiction." These principles apply to this case, and are conclusive in favor of the jurisdiction of a court of equity to grant the relief sought.

This is not, on its face, a pure bill of discovery; does not purport to be, but a bill for an account with discovery incidental to and in aid of that relief.

The discovery sought is such as the party may well ask under the facts of his bill. The law would presume that the books, accounts, notes, and papers generally of the deceased went into the hands of his personal representative. The book of accounts kept by the agent

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cannot be rightfully withheld from his principal, on an account of the matters of the agency, such as is sought in this case.

Let the cases be reversed and remanded for answer, defendant paying costs of the demurrers in court below, and all costs in this court.

DAVID R. VANCE v. A. A. COOPER.

ATTACHMENT AT LAW. *Property specified. Assignment.* The lien, of an attachment at law which does not specify the property against which it issues, does not attach until levy, as against intermediate purchasers.

Case approved: *Lacey & McGhee v. Moore, Lewis and Gown*, 6 Cold., 348.

Code construed: Code, 3507.

FROM BEDFORD.

In this case, reported in 2 Cold., 497, a petition for re-hearing having been filed at the December Term, 1865, the cause came on this term to be re-argued.

The copy of the attachment does not show when it issued, but it is stated in the charge of the Circuit Judge that it issued on the 8th of November, 1860.

ED. COOPER, for plaintiff in error.

W. H. WISENER, for defendant.

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FREEMAN, J., delivered the opinion of the Court.

This is an action of replevin from the Circuit Court of Bedford County, brought by defendant in error for the recovery of certain slaves and other property, alleged to be wrongfully in possession of plaintiff in error.

The material facts in the case, are, that one Stephens, who owned the property at the time, on the 19th of November, 1860, conveyed it to Cooper, the defendant in error, in trust for the payment of certain debts in said deed mentioned. This deed was duly acknowledged and registered at ten minutes past eight o'clock on the morning of the day of its execution. It appears, further, that Stephens, at the time he made the conveyance in trust, had knowledge of the attachment, which was afterwards levied on the property.

Vance, the plaintiff in error, was a Deputy Sheriff of Bedford County, and as such, on the 21st day of November, 1860, levied a judicial attachment on the property in controversy, issued by the Circuit Court of Bedford County, in favor of Eakin & Co.; said attachment having been ordered by the Court at August Term, 1860, against said Stephens and Alonzo Murphy.

The question presented in the case, is, which shall prevail, the title of Cooper under the deed of trust, or the right of Vance, the Deputy Sheriff, by virtue of the levy of attachment.

The judicial attachment under which Vance took possession of the property, on its face, recites the facts necessary to authorize the Court to issue it, and that "upon motion of plaintiff an order for judicial attachment was

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awarded against said defendants—Now, therefore, you are commanded that of the goods and chattels, lands and tenements of the said defendant, to be found in your county, to attach so much thereof as may be necessary to secure the debt of the plaintiff aforesaid.”

It will be seen that this attachment is directed against the “goods and chattels, lands and tenements of the defendants” generally. The Circuit Judge charged the jury, “that if the attachment had set out the property specifically, to be attached, then I would say the defendant had the superior title; but as it does not so set out the property, and the trust deed was executed and registered before the levy, I am of the opinion, the title acquired by the trust deed, is superior to that acquired by virtue of the levy.”

The jury found for the plaintiff below, and the case is here by appeal in the nature of a writ of error.

Was this charge given by the Court to the jury correct, is the question for our decision.

The order of the Court, under which the attachment issued, is recited in the writ in this case, and we think this is no error in his Honor’s charge of which plaintiff can complain. By 3507 of the Code, it is provided that “any transfer, sale or assignment made after the filing of an attachment bill in Chancery, or *after* the suing out of an attachment at law, of property mentioned in the bill or attachment, as against the plaintiff, shall be inoperative.”

We think there can be no difficulty in ascertaining the meaning of the section. “The sale, transfer or assign-

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ment, is inoperative" against the plaintiff, from the time of *filing* of the bill in Chancery, of property *mentioned* in the bill—that is, such specified property as appears on the face of the bill to be the object of the proceeding to reach, and to appropriate to the satisfaction of the claim or demand of the complainant.

The like provision is made in favor of attachments at law, and all sales, transfers and assignments are, as against the plaintiff, inoperative and void from the suing out of the attachment, if properly mentioned in the attachment—that is, specially designated in that proceeding, and distinguished from the general estate of the defendant, as being sought to be appropriated to the satisfaction of the claims of the plaintiff in that case.

In cases at law, the lien is given from the time of suing out the attachment, as against the property mentioned in the attachment. The writ always following the order granting it, and reciting it, the property against which the attachment is sought will always readily be ascertained in the office of the court of justice granting it, and parties purchasing property of persons in doubtful circumstances, as is most usually the fact in such cases, may well be required to examine these offices to see if any liens have attached before purchasing.

We need not go further into the discussion of this question. The principle is properly settled by our predecessors, in an opinion by Judge Smith, in the case of *Lacy & McGhee v. Moore, Lewis and Govan*, 6 Cold., 348, where the former decision in this case is reviewed and overruled.

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His Honor, the Circuit Judge, having charged in accordance with this view, and the jury having rendered a verdict in accordance with that finding, we affirm the judgment of the Circuit Court.

J. B. BREVARD v. C. B. SUMMAR and G. W. BOGLE,
and W. R. BOGLE v. MARTHA J. WOMACK *et als.*

1. **VENDOR'S LIEN.** *On lands conveyed.* A vendor of lands conveyed is presumed to intend to retain his lien for the purchase money.
2. **SAME.** *Waiver. Note or bond, personal security.* Taking a note or bond for the price, with the endorsement or security of a third person, is evidence of a waiver of the lien, which requires to be rebutted by proof.
3. **RECORD.** *What is, on appeal.* Papers copied into the record, not exhibits, not marked filed, and with "nothing upon them by which the Court can see that they are evidence," cannot be regarded by the Court.
4. **EVIDENCE.** *Constable's receipt.* A Constable's receipt to a surety for moneys due upon a judgment, is not evidence of its payment, as against a purchaser from the principal judgment debtor, or, it seems, against the debtor himself.
5. **CHANCERY PRACTICE.** *Parties. Petition in cause making complainants. Consolidation.* A bill was filed by a vendor of lands against the representatives of the deceased purchaser, who were brought properly before the Court, but the lien had been waived. An owner of part of the purchase money, to whom the purchaser had executed a note, came in by petition *ex parte*, and was made co-complainant. A creditor of the vendor, having attached the interest of the vendor, attacking the sale as fraudulent against creditors, had his bill consolidated with that of the vendor, upon petition. Held, that, as the vendor had no lien, his assignee could be subrogated to nothing; that the creditor, not having made the heirs and representatives of the purchasers parties to his bill, all of them being minors, the Court did not, by the order of consolidation, obtain jurisdiction of them as to his suit, and could have

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no relief against the land, nor against the fund, which his debtor had failed to recover. A decree in such case having been made for sale of the land, to pay the debt of the first petitioner, the creditor, who had a decree below for the balance of the fund coming to the vendor, if any, appealed. The Court reviewed the whole decree, and held it erroneous.

6. SAME. *Plea. Setting down for argument.* A motion to strike out a plea in equity, is equivalent to setting it down for argument.

Cases cited: *Campbell v. Baldwin*, 2 Hum., 248; *Marshall v. Christmas*, 3 Hum., 617.

FROM CANNON.

Appeal from the Chancery Court at Woodbury, B. M. TILLMAN, Ch., presiding.

JAS. S. BARTON, for appellant, Summar, cited Sto. Eq. Jur., §§ 1018, 1020, 1227, and note 2; 3 Sim., 499. Mylne & K., 296, 310; 3 Yo. & Col., 55, 61; 2 Meigs' Dig., 924.

J. L. FARE, for Brevard.

FREEMAN, J., delivered the opinion of the Court.

This record presents the following state of facts: Geo. W. Bogle and W. R. Bogle, on March 13, 1861, sold a tract of land of about seventy acres, to one F. A. Womack, at the price of \$1,500. They took from him a penal bond in the sum of three thousand dollars, of that date, with one A. S. McKnight as security on the same, binding said Womack to assume and pay for the said G. W. and W. R. Bogle, the following debts: \$750, due from them to John H. Smith, due 25th December, 1860; one debt to T. B. Brevard for \$150, endorsed by A. S. McKnight and J. P. McKnight; one judgment in favor of

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T. B. Brevard for \$195, stayed by P. S. Leach; \$20 against W. R. Bogle, stayed by A. S. McKnight before N. W. Summar, a Justice of the Peace, and remainder of the \$1,500 for said land, to be paid on a debt W. R. Bogle owed J. B. Brevard, due 25th day of December, 1860.

The instrument concludes as follows: "Now if we shall pay the above specified debts for the said W. R. and G. W. Bogle, then this obligation to be void, otherwise to remain in full force and effect.

"T. A. WOMACK, [Seal.]

"A. S. MCKNIGHT, [Seal.]"

Womack, the vendee, died some time after his purchase, and failed to pay the debts as he had bound himself by his bond to do.

On April 25th, 1866, the said G. W. Bogle and W. R. Bogle filed their original bill in the Chancery Court at Woodbury, in which they state the facts as above, against Martha J. Womack, the widow of F. A. Womack, one Brison, his administrator, and his minor children, Sarah J. B., Margaret L. and Cicero Womack, and pray that the contract be rescinded; and if that cannot be done, then that the land be sold to pay the \$1,500. They do not in terms claim a lien on the land, but assume their right to have it sold, partly on the ground of vendor's lien, and partly on the ground that Womack had another tract of land, out of which the widow had been endowed, sufficient to pay balance of his debts, and that McKnight, the surety to the bond, had become insolvent.

Defendants were all regularly served with process in this case; guardians, *ad litem*, appointed for the minors, who filed an answer for them; the adult defendants fail-

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ing to answer, an order *pro confesso* was regularly taken against them; and we may add that, from this time, there seems to have been a series of errors and irregularities to the end of the case.

There were some depositions taken which showed that the debts had not been paid by Womack, and that on one debt one of the Bogles had paid \$95; and that McKnight, the surety, had become insolvent, and that T. A. Womack's personal estate was small, not enough to pay his debts; and that by selling the land outside the dower, on which the widow lived, it might pay his other debts, but not this debt of \$1,500. So this case stood until August 24, 1867, when T. B. Brevard, whose debts were to have been paid by the said Womack, intervened, by an *ex parte* petition, "filed, in the language of the petition, in the nature of a cross bill, in which he states the above proceedings, claims that he is interested in the matter, as being the party, or one of the parties who was to be paid by Womack, and that his debt, then amounting to about \$1,000, was unpaid, except the \$95 paid by one of the Bogles;" and then adds, "petitioner will further show and charge, that as the land was sold and the purchase money was to be paid to petitioner, that he has a lien on said land for his money as a vendor's lien;" he then prays that he may become a party complainant in the above suit—and then prays that on final hearing the land be sold, for all the parties concerned, and the debt of petitioner paid, and winds up with a prayer for general relief.

No parties are made to this petition, nor any process prayed against any one. Upon presentation of this *ex parte* petition, the Court ordered that he be allowed to be made

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a party complainant, by consent of the complainants, and the cause was then continued till the next term of the court.

The next thing we find in the record is an attachment bill, filed by one C. B. Summar against W. R. and G. W. Bogle, in which it is claimed that Summar, as indorser for W. R. Bogle and F. A. Womack, had a judgment rendered against him, together with the said parties, in favor of one Cummings, for — dollars, and that he, as such indorser, was compelled to pay the same, amounting to \$292.72, and that Womack had since died, and that the administrator had suggested the insolvency of his estate, and therefore he did not sue the said administrator; that W. R. Bogle was liable to him for this money, and had no other means to pay it except as hereinafter stated; that on the day this judgment was rendered, W. R. Bogle sold his interest in 230 acres of land to his son, G. W. Bogle, and that this sale was fraudulent and void; made to hinder and delay his creditors; that the land had been sold to various parties, till there only remained between fifty and one hundred acres, on which said W. R. Bogle now lives, it being the land in controversy. The bill then charges that the said defendants are about to fraudulently dispose of said land to defraud him, and delay him in the collection of his debt.

He prays that they may be made defendants, that an attachment issue attaching said land, and that on final hearing the land be sold on six months' credit without right of redemption, and the proceeds be applied to the payment of his debt.

This bill was filed April, 12, 1867. The defendants, G. W. Bogle and W. R. Bogle, filed a plea in abate-

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ment to this bill, alleging that the sale to G. W. Bogle by W. R. Bogle was made in good faith and for a valuable consideration, and denying that they had fraudulently conveyed, or were about fraudulently to convey the land in the bill mentioned, and asking that the attachment be abated and the bill dismissed.

This plea was set down for argument as insufficient, or, what was equivalent to it, a motion was made to strike it out, and the motion sustained by the Chancellor. In the meantime, at February Term, 1868, Summar filed a petition *ex parte*, in which he states the fact of the filing of his bill; refers to the allegations as a part of this petition; then states that he was not aware, at the time of filing his attachment bill, of the preceding suits hereinbefore mentioned, nor of the fact of the sale of the land to F. A. Womack; that said sale to Womack was fraudulent, and intended to cheat, wrong and defraud petitioner and other creditors of the said G. W. and W. R. Bogle; and that in that suit they were trying to have the land sold to pay Brevard's debt, in fraud of the rights of petitioner, as attaching creditor. He prays that his suit against the Messrs. Bogle be consolidated with the other cases, and be heard together. Upon this petition, the Chancellor ordered that it be consolidated with this cause, and that they be tried together.

From an agreement in the record, it would seem that the bill of Summar was taken for confessed against the Messrs. Bogle, after their plea was disallowed.

There are various papers in the record, purporting to be judgments in favor of Brevard, and a paper purporting to show a judgment in favor of Cummins, against

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W. R. Bogle, F. A. Womack and C. B. Summar, together with what purports to be a Constable's receipt, which recites the fact that Summar, as indorser, had satisfied the judgment. We need but say here, that we can not look to these papers for any purpose. They are not made exhibits, are not marked filed, and have nothing upon them by which we can see that they are evidence in the cause. As to the Constable's receipt, it is not shown to have ever been filed in the cause; nor would it be any evidence against the minor heirs of Womack, if it had been filed, or perhaps against anybody else, except the Constable, or his principal, Cummins, in a proper case. It cannot be looked to here, for any purpose.

Upon this state of the facts, the cases, as consolidated, were all heard together; and the Chancellor rendered a decree upon bill, order *pro confesso*, answer of the minors by guardian *ad litem*, exhibits and proof, in which he declares that the sale of the land by the Messrs. Bogle to Womack was *bona fide*, and that a deed was made conveying it to him; that the bond executed by Womack, with McKnight as security, by which Womack had bound himself to pay the \$1,500, the price of the land, to J. H. Smith and T. B. Brevard, in discharge of the debts of W. R. Bogle, created a lien on said land in favor of the Messrs. Bogle, for the use of Smith and Brevard, to the amount of the \$1,500, and that Womack was dead, and McKnight insolvent; that T. B. Brevard had made himself party complainant, and had established his debts, which he declared were a lien on the land; that it was suggested and admitted that

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Smith's debt, secured by Womack's bond, had been paid by the Bogles, and an order of reference was made to ascertain the amount so paid, and by which one of them. The Court then decrees that the attorney's fees, costs, and debt of Brevard were a prior lien to Summar's debt; ascertains the amount of Summar's debt, amounting to \$302.35; and that he, having filed his attachment bill before the purchase money for the land was paid, has a lien on any amount that may be found due W. R. and G. W. Bogle for money paid on the Smith debt; and then decrees that the land shall be sold; from which decree, defendant, Summar, prays an appeal to this Court; and then the parties agree that the land shall be sold, notwithstanding the appeal; but the funds are retained in court till next term. We may add that a petition for re-hearing was filed by Summar, which was refused, but this need not be further noticed.

It is difficult to decide how much of this decree is before us for revision, but as the three cases seem to have been treated as one case in the Court below, and in the argument here, we deem it due to the ends of justice to make a decision that will settle all the questions made in the record.

1. It is clear that the Bogles had no lien whatever on the land for the payment of the \$1,500 purchase money agreed to have been paid to Smith and Brevard by Womack, and for which they took the bond of Womack and McKnight, as security.

"A vendor is presumed to intend to retain his lien upon the conveyed premises for payment of the purchase

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money, and the circumstance to manifest the non-existence of such intention, must be shown by the vendee." *Campbell v. Baldwin*, 2 Hum., 248.

The taking of a note for the purchase money, with the indorsement of a third person, is evidence that the lien of the vendor is waived and abandoned. "This *prima facie* evidence, to be sure, may be repelled by proof, but the onus lies upon the vendor to make that proof; and if he fails to do so, it must be held that the lien was waived and abandoned." *Marshall v. Christmas*, 3 Hum., 617, 618. There is nothing in this case to rebut the presumption of waiver raised by taking the penal bond of Womack, with McKnight as surety. It is a much stronger case than the taking of a note with the indorsement of a third party.

If the Bogles, then, had no lien, it follows that Brevard had none, as a matter of course, nor right of substitution to any, in the place of said Bogles, who had none themselves.

Summar is contesting the question of priority of liens, as between his attachment bill and Brevard's assumed lien, by virtue of the bond given by Womack to the Bogles. We have seen that Brevard had no lien; and it is equally clear that Summar has no lien by virtue of these proceedings, on either the land or its proceeds. His attachment bill was filed against the Bogles alone; they alone are made parties to it. The fact that it was, as it is called, "consolidated" with the original cause of the *Bogles v. Womack*, *et als.*, can give no lien or right of any kind against the land of the widow and heirs of Womack,

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who are not made defendants to this bill, and have no chance to contest his right. Besides, the decree settles, properly from the facts of the case, that the sale by the Bogles to Womack was *bona fide*, and not fraudulent. Summar now complains of the decree because it gives Brevard a lien on the land in preference to him. As against the true owners, the heirs and widow of Womack, Summar's bill gave him no lien or right whatever, under the facts of the case and the state of the pleadings in this record.

It seems to have been thought by the counsel and acted on by the Court, that because the various parties had been allowed to consolidate their cases with the original case, that they were entitled to consider the defendants to the original case as defendants to their bill, and have a decree against them, part of them being minors, without even making an issue with them by the pleadings, or giving them a chance to be heard.

We need not go into a further discussion of the case, as we might, and point out other errors apparent in the proceedings.

Inasmuch as the whole contest seems to have turned on the question of the Bogles and Brevard having a lien for purchase money, and the land of minors has been ordered to be sold without authority, we proceed, as far as we can, to give such decree as the Chancellor should have given or might have given in the case.

We, therefore, decree:

1. That the Bogles had no lien on the land.
2. That Brevard had none.

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3. That Summar had none on this land attached, because there is no proof in the record that the sale to Womack was fraudulent, even if, in the state of the pleadings, he had been in a condition to show that fact.

4. That inasmuch as the Chancellor has found the amount of the debt due by W. R. Bogle to be \$302.30, and this debt is not contested, a decree can be entered against said Bogle personally for said sum.

5. That the order of sale of the land and the payment of the attorney's fees and costs out of its proceeds be set aside.

And lastly, that all the balance of said decree be reversed, and that complainants, Bogles and their sureties for the prosecution of the suit, pay the costs of their bill against Martha J. Womack, the widow of F. A. Womack, the same being ordered to be dismissed; that Brevard pay the costs incident to his being made party to the suit.

That W. R. Bogle pay the costs of the case of Summar against him, and Summar and his security pay all the costs of this Court.

Levan v. A. E. Patton *et al.*

LEVAN v. A. E. PATTON *et al.*

CHANCERY PLEADING. *Averments.* A bill to enjoin a judgment at law, on the ground of newly discovered testimony, showing payments which should have been allowed on the debt, which states, generally, that complainant did not know he could make this proof until after the judgment and adjournment of the Court; that he used all diligence to get this proof, but did not succeed until after the trial, is not sufficient on demurrer, without stating the facts specifically.¹

FROM GRUNDY.

In the Chancery Court at Altamont, before B. M. TILLMAN, Ch.

M. F. TURNEY and J. M. BOULDIN, for complainant.

A. S. COLYAR and A. S. MARKS, for defendant.

DEADERICK, J., delivered the opinion of the Court.

The bill, in this case, was filed to enjoin a judgment at law, obtained against the complainant by defendant, Patton, in the Circuit Court of Grundy County.

The ground stated in the bill, is, that since the trial at law, complainant has discovered payments to the amount of \$500 or \$600, and he did not know that he could make this proof until after the judgment and adjournment of Court.

Complainant states, further, that he used all diligence

¹ See *Ford v. Ford*, 2 Cold., 74-76; *Weatherhead v. Boyers*, 7 Yer., 545, 563; and see *Burson v. Dosser*, 1 Heis., 754.

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to get this proof, but did not succeed until after the trial.

Defendant demurred to the bill, and the Chancellor sustained the demurrer and dismissed the bill, from which decree complainant appealed to this Court.

How and when the payments were made is not stated, nor is it stated what acts of diligence were used to obtain the proof, nor why he was unable to succeed.

A party will not be aided by a Court of Chancery, after a judgment at law, unless he can impeach the justice of the verdict on grounds of which he could not have availed himself at law, or unless he was prevented from doing it by fraud, or accident, or mistake, or the act of the adverse party, unmixed with negligence or fault on his part. And all this should be alleged and shown in the bill, by the statement of the facts which the party relies upon as constituting the grounds of his relief, so that the Court may be enabled to determine whether they are sufficient.

It will not suffice to charge, in general terms, that he was prevented from making his defense at law by accident or mistake, without disclosing in his bill the nature of the one or the other. So it is not sufficient to exonerate himself from the presumption of negligence to allege, in general terms, that he has used diligence. He should show what he has done, to enable the Court to determine whether he has used that degree of diligence which the law requires he should use in the particular case.

There is no error in the Chancellor's decree, sustaining the demurrer and dismissing the bill, and we affirm it.

John Smith and Wife v. W. Thurman *et al.*

JOHN SMITH and WIFE, in error, v. W. THURMAN, *et al.*

1. NUNCUPATIVE WILL. *Rogatio testium. Animus testandi. Quantum of proof.* A person being on his death-bed, a witness told him he was very sick, and could live but a short time; that "if he had any request to make, or wanted to make any disposition of his property, he ought to make it." The dying man said "he wanted Winton and Sally, (two illegitimates,) to have the land, (which he had previously deeded to them,) and be made equal to the rest of his children." Held to be no *rogatio testium*—nor sufficient proof of the *animus testandi*. It may have been an expression of satisfaction at what was already done, as well as a new provision.
2. SAME. *Construction.* A paper drawn up and presented to the County Court stated the testamentary words to be, "that he wanted his two children, Winton and Sally, to have the land, and made equal with his other children." Held that this purported to dispose of nothing but land, and could not be set up as a nuncupative will.
3. SAME. EVIDENCE. *Quantum of proof.* It requires more stringent evidence to prove a nuncupative, than a written will.

Cases cited: *Baker v. Dodson*, 4 Hum., 342; 8 Hum., 645; 2 Cold., 30.
Code cited, 2165.

FROM WARREN.

Devisavit vel non in the Circuit Court, before N. A. PATTERSON, J.

J. H. SAVAGE, for the plaintiff in error, contended that the same indential declaration must be proved in the Court, and taken down in writing within ten days, as is afterwards proved on the issue, citing 10 Yer., 504; 1 Jarman, 347, 133; Modern Probate, 304, 5; 4 Kent, 517; 2 Bl., 500. Proof must be full as to every fact required by the statute; 2 Cold., 30; 1 Green., Ev., § 440; Modern Probate, 304, 305, 307, 308, 312; 1 Sneed., 616; 1 Jarman,

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89, 90; 4 Kent, 517; 2 Bl., 500. A nuncupation made on suggestion of another, void: *Brown v. Brown*, 2 Murphy, (N. C.,) 350. Will may be contested as to realty, but left in force as to personalty; 3 Head, 658; 1 Jarm., top, 353, 351, n. 1. What is a will, 2 Bl., 99; Tol. on Ex., 1. Error to charge that the whole body of the writing must be found to be a will, and the operation left to judicial construction: 3 Head, 658; 1 Jarman, 355, 356. If there is time to make a regular will, nuncupation is void; Mod. Prob. of Wills, 312, 313; 1 Jar., 89, 90, 133; 10 Barb., 254; 20 Johns, 50-, 514. As written, it is vague and void, for uncertainty: 1 Jar., 316, 317, 322; Broom's Maxims, 574.

Brief of TURNEY, J., W. E. B. JONES, and — MURRAY, cited *Gwin v. Wright*, 8 Hum., 639; *Hoover v. Gregory*, 10 Yer., 444, 451; *Henderson v. Vaulx*, 10 Yer., 34; *Tally v. Butterworth*, 10 Yer., 505; *Baker v. Dodson*, 4 Hum., 342; *Hatcher v. Millard*, 2 Cold., 30; *Williams v. Williams*, 10 Yer., 25.

TURNEY, J., having been of counsel, did not sit.

DEADERICK, J., delivered the opinion of the Court.

This is a case of a contested nuncupative will, brought up by appeal in error to this Court from the Circuit Court of Warren County.

A. McDaniel died at his home on the night of the 8th of January, 1863. A few hours before his death, D. F. Woods, in the presence of Thomas Muzzy and J. W. Miller, told deceased that he was very sick and could live but a short time. McDaniel said he knew he was very bad. Woods then asked him if he had any request to

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make, or any disposition of his property, if so, he ought to make it. McDaniel then said, "that he wanted his two children, Winton Thurman and Sally Thurman, to have his place, and made equal with his other children." The deceased never spoke after this declaration was made, and died in three or four hours.

On the 12th day of January, 1863, the declarations of deceased, as above given, were reduced to writing by D. F. Woods, and sworn to by him and Thomas Muzzy before G. W. Martin, a Justice of the Peace of Warren county, on the same day.

At the next succeeding April Term of the County Court of Warren county, the paper drawn up by Woods as the nuncupative will of the deceased, was offered for probate, and the declarations as set out in the papers proved by Woods, Muzzy and J. W. Miller, the three witnesses who were present when they were made by deceased.

Plaintiffs in error appeared in the County Court and contested the validity of the alleged will, whereupon the fact was certified to the Circuit Court of said county, together with the paper writing propounded for probate as the nuncupative will of Abram McDaniel, deceased.

An issue of *devisavit vel non* was made up in the Circuit Court, and this issue was tried by a jury of Warren county, at the June Term, 1867, of the Circuit Court, resulting in a verdict establishing the will.

D. F. Woods, Thomas Muzzy and J. W. Miller, upon the trial of the case, proved that deceased died January 8, 1863, at his own house in Warren county, where he had resided for several years; that he was very sick, and suf-

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fering at the time great bodily pain; that three or four hours before his death, D. F. Woods approached his bedside, and told deceased that he was very sick, and that he could live but a short time. Deceased replied that he knew he was very bad. Woods testifies that he then told him if he had any request to make, or wanted to make any disposition of his property, he ought to make it. McDaniel then said he wanted Wint. and Sis, (meaning, as they understood him, Winter Thurman and Sally Thurman, the defendants in error,) to have his land, and enough to make them equal with the rest of his children.

Thomas Muzzy stated on the trial, that deceased said "that he wanted the Thurman's to have that land, and enough of his other property to be made equal with the rest of his heirs."

J. W. Miller testified on the trial, that deceased said "he wanted them, the Thurman children, Wint. and Sis., to have his land, and enough of his other property, to make them equal with his other children."

The Thurmans were the illegitimate children of deceased, and Smith's wife was his legitimate child.

All three of these witnesses, four days after the death of McDaniel, swore to the paper presented for probate, and upon which the issue in this case was made up, as containing the declaration of McDaniel.

By our statute, which is a substantial copy of the statute of 29 Car., 2, for the prevention of frauds and perjuries, it is indispensably requisite to the validity of a nuncupative will, that the will be proved by two disinterested witnesses, present at the time of making thereof, and they, or some of them, must be especially re-

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quired to bear witness thereto by the testator himself. Code, 2165.

It has been held by this Court, that it is a sufficient compliance with that part of the statute which requires that the witnesses, or some of them, shall be especially required to bear witness thereto by the testator himself, if he, by intelligent act and language, invoke their special attention to what he has said, or is about to say. 4 Hum., 342. In that case, the testator, addressing the witnesses, said, "I wish to make a disposition of my effects," and then went on to declare the nuncupation, and explained to the witnesses the motives for making the particular disposition of his property. And this was properly held a valid nuncupative will, as complying with the statute requiring that the testator should especially require witnesses present, or some of them, to bear witness thereto, and as also clearly evincing an intention to perform a testamentary act.

In the case in 8 Hum., 645, 6, the Court says: "We have no desire or intention to go further in extending the meaning of the words, 'specially required to bear witness thereto,' than has been done in the case of *Baker v. Dodson*," 4 Hum., 342.

In a still later case, this Court held that it is indispensable to a valid nuncupative will, that the testator should especially call the witnesses to the fact; and while it is not necessary to use the precise language of the statute, words of equivalent import should be used, showing that testator considered himself engaged in a testamentary act. 2 Cold., 30.

The provisions of the statute in regard to nuncupa-

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tive wills have been strictly enforced by the courts; and they have generally adopted a rigid and strict construction in regard to them. It must appear that all the requirements of the law have been complied with.

Independent of the statute of frauds, the *factum* of a nuncupative will requires to be proved by more strict evidence than a written one. The testamentary capacity, the *animus testandi*, and the *rogatio testium*, at the time of the alleged nuncupation, must appear by the clearest and most indisputable testimony. Red. on Wills, part 1, 187, 8; 1 Wms. on Exrs., 105.

Tested by these rules of law, and by the rules laid down for their construction, can it be said that the paper propounded and upon which the issue in this case has been made, can be held to express the nuncupative will of the deceased?

We think not, for several reasons.

The leading object of that part of our statute which requires that the witnesses, or some of them, shall be especially required to bear witness thereto by the testator himself, is to distinguish between a valid nuncupation and casual conversations by one in his illness as to his wishes on the subject of his property, and to guard against the latter being imposed upon the Court as testamentary. 4 Hum., 344.

In all the cases in our books of reports, in which nuncupative wills have been sustained, the testator unmistakably indicated his purpose of performing a testamentary act.

But in this case the expression that he "wanted his two children, Winton and Sally Thurman, to have his

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place, and made equal with his other children," in view of the fact that he had theretofore conveyed "his place" to them by deed, may as reasonably be construed as the expression of his satisfaction with the provision he had already made for them, as that he thereby intended to make any further provision for them by a testamentary act which he understood himself as then performing.

At all events, there is not that full and satisfactory evidence of the *animus testandi* required by law, nor that clear and indisputable testimony of the calling upon the witnesses by the testator to bear witness to the fact of making a will, which is required by law to establish a nuncupative will.

But in the view we have taken of this case, if the law had been complied with in all other respects, this supposed nuncupative will, as reduced to writing and proved in the County Court, could not be established as a will, because it purports to devise land and nothing else.

We hold, therefore, that the judgment of the Circuit Court was erroneous.

Let the judgment of the court below be reversed, and the cause remanded for a new trial.

Wm. Baker v. Mayor and Aldermen of McMinnville.

WILLIAM BAKER v. MAYOR and ALDERMEN OF MC-MINNVILLE.

LOST PAPER. *What may be supplied.* Under the Code, 3907, no paper can be supplied, unless it has been filed.

Cases cited: *Pierce v. Bank of Tennessee*, 1 Swan, 265; *Lane v. Jones*, 2 Cold., 318.

FROM WARREN.

In the Circuit Court, S. N. BURGER, S. J., presiding.

FRAZIER, STUBBLEFIELD & RANKIN, for plaintiffs in error.

SNEED, J., delivered the opinion of the Court.

This was a petition for a *mandamus* to compel the corporate authorities of McMinnville to open a street. The first objection taken by defendant is fatal to the proceeding. The original petition had been lost, and the plaintiff was permitted to file another, alleged to be the same in substance as the lost petition. There is no proof that the original petition had ever become a record of the Court by being filed with the Clerk. It is only a record, proceeding or paper, filed in an action at law or equity, which, if lost or mislaid, may be supplied under the provisions of the Code, 3907. There must be proof that the paper proposed to be supplied had been filed. In this case there is no such evidence. The affidavit of the petitioner verifies the second peti-

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tion as the same in substance with the first one, but does not show that the first was ever filed in court. The affidavit of the Clerk states that, after diligent search in his office, the petition can not be found. But there is no evidence whatever of the filing of the original. Without this proof the lost paper could not be supplied. In this view, it is unnecessary to express an opinion upon the various assignments of error made by defendant. 1 Swan, 265; 2 Cold., 318.

The judgment is reversed, and the petition dismissed.

MARTHA WYNNE *et al.* v. JOHN B. WARREN *et al.*

TRUSTEE. *Personally liable for investment without security.* A trustee having a fund directed by decree to be laid out in a peculiar mode, finding that investment impracticable, loaned the money during the late war, to solvent parties, without security. Held, that he was liab'e, upon their insolvency, for the loss.

FROM LINCOLN.

In Chancery at Fayetteville, before J. P. STEELE, Ch.

J. B. LAMB, for complainants, cited 2 Kent, 250, n. a; Edwards on Receivers, 592; *Smith v. Smith*, 4 J. C. R., 281; *Robertson v. Sublett*, 6 Hum., 313; 2 Story Eq. Jur., § 1274; *Beeler v. Dunn*, 3 Head, 91; *Hester v. Wilkerson*, 6 Hum., 219.

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J. P. DISMUKES, for the Commissioners, cited 9 Hum., 612; Greenl. Ev., 642; 5 Sneed, 39; 3 Sneed, 375.

SNEED, J., delivered the opinion of the Court.

The complainant, Martha Wynne, is the widow of Thomas R. Wynne, deceased, who departed this life in Lincoln county, in June, 1856, leaving a last will and testament, of which complainant, Willis G. Rives, is the surviving executor; and leaving two children, the defendants, Harriet and Catharine, who, with their mother, Martha, are the only legatees of said last will and testament. In the will there was a bequest of a slave named Jim, to complainant, Martha, for life, with remainder to defendants, Harriet and Catharine. The complainants filed their bill, making the said Harriet and Catharine, with their regular guardian, John B. Warren, defendants, and representing that it would be to the manifest advantage of both the life estate and the estate in remainder, that said slave, Jim, should be sold, and the proceeds invested in a young negro woman, and praying for such sale and investment, or for the exchange of said negro, Jim, for a negro woman, or woman and child, as might be deemed most proper and expedient. Upon a reference to the Clerk and Master to take proof upon the subject, that officer reported favorably, and recommended the appointment of a Commissioner to carry out the object of the complainant. The defendants, William B. Beattie and Daniel J. Whittington, were, by the decree of the Court, appointed Commissioners to effect said sale or exchange at the Feb-

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ruary Term, 1859, of said Court, and accepted said trust. That part of the decree which imposes said trust is in the following words: "It is, therefore, ordered, adjudged and decreed by the Court, that William B. Beattie and Daniel J. Whittington be appointed Commissioners, who shall be and are hereby empowered to exchange or swap said boy, Jim, for a young negro woman or young woman and child; and upon such a swap or exchange, said Beattie and Whittington are authorized to execute a bill of sale, as Commissioners, for said boy, Jim; and in consideration thereof, they are further authorized to take title to such negro woman or woman and child, to the said Martha Wynne, for and during her natural life, with remainder in such slave or slaves to the infants, Harriet W. and Catharine V. Wynne. The said Commissioners, before such exchange, will carefully investigate the title to any such slave or slaves as they may propose to receive in exchange for said boy, Jim; or if the aforesaid Commissioners, to effect the end desired, should deem it best to sell said slave, then they are empowered so to do for cash, or on any time not exceeding ten months, either at private or public sale, taking and giving bills of sale, as hereinbefore directed; and if sold, the said Commissioners shall retain a lien on said boy until the purchase money is paid; on all of which matters said Commissioners shall make due report at the next term of this court."

At the February Term, 1860, the defendants reported that they had found it impracticable to exchange said negro boy, Jim, for a woman or woman and child, and that they had sold the negro boy for one thousand dol-

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lars, his full value, and taken the purchaser's note with good and sufficient security, due the 25th December, 1859, and that they had not been able to invest the fund in a negro woman, as contemplated when they were appointed Commissioners for that purpose. At the same term, the order for said investment was by the Court renewed. At the August Term, 1860, the Commissioners made further report that the purchase money for said slave had not yet been paid; and thereupon judgment was rendered against the purchaser for the sum due, amounting to \$1,041.35, and execution awarded. From the said August Term, 1860, to the February Term, 1866, no further steps seem to have been taken in the cause. At the latter term, the Commissioners were ordered to make their report if practicable; and if not practicable they were allowed until the term following, at which term, August, 1866, they reported the payment of the purchase money and interest, \$1,126.15, on the 10th of January, 1861, to R. A. McDonald, acting Clerk and Master; that they had found it impossible to purchase such a woman as the complainant wished for said sum of money, after repeated efforts; that they had arranged it with the complainant and with the guardian of the children to increase the fund by contribution of one-third from the complainant and two-thirds from the estate of the children, so as to raise the amount to \$1,400, and that the authority of the Court was to be invoked to that end; but the war intervening, their plans were interrupted; that being fearful in the then disturbed state of the country the money would depreciate and become worthless, they were unwilling to receive it, and they

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had loaned the fund to Messrs. McDonald & Kelso, then believed to be perfectly good, taking their note for the amount. That as they could not invest the fund as directed, they had loaned it in order that it might be productive to the parties interested; that said firm of McDonald & Kelso have never paid any of said note except \$50 on account of interest, which was paid to complainant, Martha; that suit had been brought against Henry Kelso, one of the parties, and the note filed with the trustee of R. A. McDonald, who had made an assignment of his property; and that they are hopeful of success in securing the debt.

The complainants excepted to the report:

1. Because it does not show that the trustees used proper diligence in collecting the said purchase money from the purchaser of said slave.

2. It does not appear from said report, that they made any effort to invest the same as directed by the Court, after its collection.

3. That they were not authorized to loan said money.

4. That they did not demand and receive security from McDonald & Kelso, the borrowers of said fund.

The exceptions were sustained, and the parties were ordered to amend their report, and show what kind of money was paid by the purchaser to McDonald as acting Clerk and Master, and what kind of money they loaned McDonald & Kelso.

At the February Term, 1868, an amended and supplemental report was made, in which it is stated, as a reason for indulging the purchaser of the negro, that they did so at the request of the complainant, Martha, to

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whom the purchaser had agreed to pay ten per cent. interest until an opportunity offered to invest the fund as directed, and at that time he agreed to pay the whole on demand; that they declined to make this agreement for indulgence until they had consulted the solicitor of the complainant, Joel J. Jones, Esq., who advised them to that course until they could reinvest the fund. In the meantime, they made efforts to purchase the woman, but failed; and finally they became distrustful of the intentions of the purchaser, and they took judgment against him, as stated, at August Term, 1860; and, at the instance of the complainant and her solicitor, they permitted the purchaser, after the judgment, to retain the fund until he finally paid it, as stated to McDonald, the then acting Clerk and Master. That being unwilling, themselves, to take charge of the fund for the reason stated, and the said firm of McDonald & Kelso offering to take it and pay interest for it, and they being then considered perfectly good and solvent, the money was loaned to them. The price of negroes, in the meantime, was rapidly rising; there were no more sales known to them. That, in February, 1862, they found a woman for sale, and one of them took her to his house with a view to her purchase, but the complainant, Martha, did not like her; that they do not know what kind of funds were paid by the purchaser for the negro, but that, to the best recollection of one of the parties, the payment was in Tennessee and other Southern bank paper.

To this report there were two exceptions: 1. Because they had no authority from this Court to loan said

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money. 2. They took no security for said loan, as the law requires.

The decree of the Court disallows these exceptions, confirms the report, and proceeds to recite that, "it appearing to the Court that the Commissioners could not carry out the decree, after due diligence, in consequence of the high price of negro women, and because it was imprudent to do so, and that they had loaned the money to McDonald & Kelso, without any authority from the Court; but under the facts stated in said report, the Court is satisfied that they acted in good faith, and did what they believed the best for the parties; it is therefore ordered, adjudged and decreed, that said Commissioners are not liable for the said sum of \$1,043.35, and orders the bill to be dismissed at the cost of Commissioners; and it is further ordered, that said Commissioners may reimburse themselves for said costs out of any moneys that they may collect of Kelso & McDonald in the suits they are now prosecuting against them on these claims; and that, as it appears to the Court, that they have a judgment against Henry Kelso, and have his land attached, that at the sale of said land, they may bid said debt on the same, or do any other lawful act to collect the money on said judgment." From this decree the complainant, Martha, has appealed to this Court.

We have thought it necessary to refer thus at length to the facts of this case, that the exact relation of these parties to the trust in question may be understood, and that the doctrines of the law which govern the case may be fitly illustrated.

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The proposition that confronts us at the threshold, and which is quite too plain and self-evident to demand a reason for its statement, is, that this trust fund would not have been squandered and lost to the complainant and her children if the trustees had, in assuming the responsibility of lending it, taken good security for its repayment.

The second proposition is, that if the country was in such a state of disturbance and distraction that these parties were unwilling to keep the fund about them, because they apprehended its depreciation, and they deemed it imprudent, even if practicable, to invest the funds as directed by the Court, the instincts of a common prudence would seem to have dictated a wiser course than a loan of the whole fund to a trading firm without security.

A Court of Chancery cannot overlook these salient points, in adjudging the equities of these parties. It is a familiar remark of Lord Hardwicke, that "the doctrines of the law which govern trustees should not be laid down with a strictness to strike terror into mankind acting for the benefit of others, and not for their own; and that as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended by no small degree of trouble and anxiety, it is an act of great kindness to accept it." We have felt the force of this observation in the consideration of this case. As far as the record acquaints us with the motives of these parties, we are not permitted to ascribe to them any but the most honorable intentions.

But yet we have, in this case, the *crassa negligentia*

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of the law books, without the slightest purpose to do a wrong. This Court has repeatedly admonished persons in a fiduciary capacity, of the severe exactions of the law, and the responsibilities of their position. Trustees must not venture to apply the trust money in a manner not authorized by the trust. It would seem a very reasonable and proper investment of one's own money, to lend it to a person of known wealth and solvency; but a trust fund, raised and created for a specific purpose, must have that direction, if possible, and, if impossible, the aid of a court must be invoked in its disposition. If the trustee give it a different direction, he does it at his peril. In this case, the parties were invested with the trust by the Court; and, in violation of its positive orders, the trust fund has been lost and destroyed. Would it be equitable and just that this woman and her daughter should lose it? We think not. The circumstances may, perhaps, excuse the trustee for not investing the fund in the manner directed by the Court; but nothing can excuse them for investing in disobedience of the orders of the Court.

In England, the lending of trust moneys, on anything less than the real security, is, even at this late day, seldom sanctioned by a Court of Chancery. In regard to the money of persons under disability, the very fact of lending upon mere personal security was considered a conversion of the fund. "It was never heard of," said Lord Kenyon, "that a trustee could lend an infant's money on private security. This is a rule," said he, "that should be rung in the ears of every person who acts in the character of a trustee; for an act may very probably be

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done with the very best intentions, yet no rule in a court of equity is so well established as this." Chancellor Kent seemed to think the English rule too strict. 4 John. Ch., R., 281, 284. But it is said that it will be at the peril of the trustee, if trust money comes to his hands, such as a debt due from a third person, to suffer it to remain upon the mere personal credit of the debtor, although the testator who created the trust had left it in that very state. 2 Story Eq. Jur., 707.

In the case before us, money was loaned in the midst of uncertain and revolutionary times, in positive disregard of the orders of a court, and without any security whatever, either real or personal. A court of law could scarcely hesitate to pronounce such a course of conduct a conversion of the fund; and a court of equity, which, Lord Coke says, is but a just correction of the law, will not.

The decree of the Chancellor is reversed, and a decree will be entered here in accordance with the principles announced in this opinion.

JAS. M. ROBERTS v. J. D. FRANCIS, A. M. ALEXANDER,
JOHN W. SUMMER *et als.*

1. VENDOR'S LIEN. *Assignee of. Judgment creditor of vendor. Priority between. Lis pendens. Registration.* Summer sold a tract of land, of ninety-seven acres, to Francis, by title bond lost and never registered, and took notes for the purchase money; two of which he transferred to complainant, Roberts, who filed his bill to enforce the vendor's lien.

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Alexander, a judgment creditor of Summer, sold the land at execution sale, pending the bill of Roberts, and bought the land. An amended bill brought him before the Court, and he set up his purchase. Held, that the vendor's lien, in the hands of the assignee, was to be preferred to the rights of the vendor's creditor purchasing at execution sale, *pendente lite*.

2. SAME. *Parol sale.* If the sale was by parol, the heirs of the vendee holding the land, and all the other parties but the creditor admitting the sale, or being bound by *pro confesso*, the same result would follow.
3. PAROL SALE. *Statute of Frauds.* Parol sale of land is not void, but voidable.

Cases cited: *Shelton v. Johnson*, 4 Sneed, 680, 681; *Thompson v. Pyland*, 3 Head, 537; *Cleveland v. Martin*, 2 Head, 128; *Ewing v. Arthur*, 1 Hum., 537; *Graham v. McCampbell*, Meigs, 52; 4 Sneed, 301, 305.

FROM CANNON.

In Chancery at Woodbury, before BARCLAY M. TILLMAN, Ch.

J. S. BARTON, for complainant, cited, as to parol sale of land, *Hilton v. Duncan*, 1 Cold., 315; *Rhea v. Allison*, 3 Head, 176; 3 Sneed, 228, 230. Notice: Story Eq. Jur., §§ 399, 400, 400 *a*, 405, 406, 408.

J. M. AVENT, with him, as to *lis pendens*, cited *Shelton v. Johnson*, 4 Sneed, 672.

J. L. FARE, for Alexander, insisted that in the absence of a registered title bond, the creditor's right to subject the land was perfect, citing *Butler v. Maury*, 10 Hum., 420; *Rogers v. Cawood*, 1 Swan, 142; *Lally v. Holland*, 1 Swan, 396.

NELSON, J., delivered the opinion of the Court.

We are satisfied, from the pleadings and proofs in this cause, that John W. Summer, on or about the 21st

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of January, 1860, agreed to sell to Eppy Francis, who died a few days thereafter, the tract of land described in the bill as containing about seventy-six acres, but more correctly described in Carnes' plat and certificate of survey, as containing ninety-seven acres; that Francis executed to Summer three notes for the purchase money, two of which were assigned by Summer to complainant, on the 12th of January, 1861, and not 1860, as stated in the bill; that complainant obtained judgment against the administrators of Francis and Summer, in the Circuit Court of Cannon, for \$553.36, the amount of the balance due on the first note assigned to him; that said judgment and the record thereof had been fraudulently abstracted or destroyed, before this bill was filed, on the 25th of September, 1865; that the record was supplied and established in the Circuit Court, by a judgment duly rendered at the February Term, 1866; and that the second note for six hundred dollars, due 1st of January, 1862, and assigned to complainant, was still due and owing when the bill was filed.

It is charged in the bill, that a title bond was executed by Summer for the conveyance of the land, on the payment of the purchase money, and that it passed into the hands of the administrators of Francis, who, in the first part of their answer, admit its existence, but state, in a subsequent part, that they may be mistaken, and that the paper which they saw may have been the plat and certificate of survey. Summer, in his answer, admits that he sold to Francis 97 acres and 5 poles of land; took three notes for the purchase money; retained the note first due; transferred the other two to complainant; says he

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was to make the title when the first payment of seven hundred dollars should be made; admits that he caused the land to be surveyed, and states that he was to have executed a title bond, if he did not, in fact, do so.

After Summer had conveyed, or agreed to convey, the land to Francis, he executed a deed on the 29th of June, 1861, to William Barton, as trustee, for 802½ acres and 18 rods, with the reservation hereinafter mentioned, to secure a debt therein specified, due D. M. Jarrett; and Jarrett insists, in his answer, that if any title bond was executed, it does not include the land, or any considerable part thereof, conveyed in said deed of trust.

After the filing of complainant's bill, A. M. Alexander recovered judgment in the Circuit Court of Cannon county, on the 12th October, 1865, against Summer, for \$878.11 and costs, under which, and the execution issued thereon, he purchased the land containing by estimation 97 acres, at Sheriff's sale, on the 4th December, 1865, and took a Sheriff's deed on the 20th August, 1867, conveying the same by the metes and bounds set forth in the plat and certificate; and he and his agent, Fare, who made the purchase for him, insist that the contract between Summer and Francis was by parol, and deny the existence of the vendor's lien claimed in the bill and amended bill.

A deed from Summer to James F. Floyd for the 802½ acres described in the trust deed to Barton, and bearing date 28th February, 1867, is contained in the transcript, but as it does not appear to have been put in issue by the pleadings, its provisions need not be here stated.

The questions principally discussed before us arise out of the question of fact, whether the contract between Sum-

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mer and Francis was in writing or by parol. It is virtually admitted, or, at the least, not distinctly denied, in the answers of Summer and the administrators of Francis, and is also admitted, by the judgment *pro confesso* as to the adult heirs of Francis, that a title bond for a conveyance was executed by Summer to Francis; and the evidence of the only two witnesses examined in the case, tends to establish the same fact. Davenport states that he had a conversation with Summer shortly after he sold the land to Francis, in which he threatened to make his debt upon Francis out of the land, but Summer said he could not do so; that Francis had not paid for the land; that he had transferred the notes to Roberts, and the land was bound for their payment. Markum, a Deputy Sheriff, declined, as he states, to levy an execution upon the land in 1862, because Summer and J. D. Francis "both said there was no deed to the land, nothing but a title bond; that the purchase money had not been paid, and *that* had to come first." A recital, however, in the deed of trust from Summer to Barton, bearing date 29th June, 1861, would, if it can be regarded as evidence in the present attitude of the case, seem to place this question at rest; for, after describing the 802½ acres by numerous courses and distances, it provides: "But this sale is made with the express reservation of so much of the land hercin embraced as I have heretofore conveyed to E. Francis, dec'd, less about 11 acres, which I re-purchased at his sale, and which is hereby sold and conveyed." The deed of 28th February, 1867, from Summer to Floyd, likewise describes the 802½ acres, "as including and excluding 79 acres sold to E. Francis;" but,

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having been made since the commencement of this suit, cannot, if it may in this case be looked to for any purpose, be regarded as affecting previous rights. The deed from Summer to Barton, as trustee, had the effect, however, to estop Jarrett, the beneficiary, as well as his trustee, to deny that there was a conveyance from Summer to Francis; but, strangely enough, the bill was dismissed as to them, by the complainants, on the final hearing, and no authoritative decree can be pronounced as to them. The case is only before us upon the appeal of the defendants, Alexander and Fare; and what attitude do they occupy in resisting the relief which the complainant invokes?

It has been seen that Fare was a mere agent for Alexander in the purchase at Sheriff's sale, and so far as this record discloses has no interest whatever in the land; and the real contest is now between the complainant and defendant, Alexander, whose suit against Summer was brought and prosecuted since the commencement of this suit, and who became a purchaser, *pendente lite*, of the land in controversy. And it is quite clear that Alexander can not, for two reasons, successfully set up title: first, because the legal title was in Barton, the trustee at the time of his levy and execution sale, and he acquired nothing by his purchase; secondly, because he was a purchaser after the commencement of this suit. It is well settled that a purchaser will be affected with constructive notice whenever his purchase is made during the prosecution of the suit brought to enforce an adverse claim or title, which is set forth with sufficient certainty and distinctness to advise him of its bearing on

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the property in litigation. See *Shelton v. Johnson*, 4 Sneed, 680, 681; and cases cited in notes to *LeNeve v. LeNeve*, 2 Lead. Cas. in Eq., 170, 171, *et seq.*, 3 ed.; 1 Story Eq., §§ 405 to 408.

As between complainant and Summer, there can be no serious question that the complainant, as assignee of two of the notes for purchase money, is entitled to a vendor's lien. See 3 Head, 537; 2 Head, 128; 1 Hum., 537; Meigs, 52.¹

As it has been earnestly argued that the contract between Summer and Francis was by parol, it may not be superfluous to consider the case on the hypothesis that there may be some doubt as to whether a deed, title bond or other writing was executed.

The bill, as we have seen, alleges that there was a title bond. Summer, in his answer, states, as above remarked, that he had the land surveyed for the purpose of executing a title bond to Francis, but that Francis died very suddenly a short time afterwards; that he does not remember whether he executed to said E. Francis a bond for a title or not; but if he did not, he was to have done so, and had the land surveyed for that purpose, as stated in a previous part of this opinion. He says, expressly, that the ninety-seven acre tract is included within the boundaries of said deed of trust to William Barton; that the legal title to said land is yet in him, but belongs to the estate of E. Francis, deceased. Neither he nor any of the defendants named

¹ See, also, *Norvell v. Johnson*, 5 Hum., 491; *Anthony v. Smith*, 9 Hum., 511; *Ellis v. Temple*, 4 Cold., 320.

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in the record pleads or relies upon the statute of frauds. If he and Barton, the trustee, had pleaded it, and such plea had been admissible in reply to the allegations of the bill, the recital in the deed for 802½ acres, of an express reservation out of that quantity, of so much as Summer had before conveyed to E. Francis, deceased, would have operated as an estoppel both upon the maker of the deed and the trustee. 6 Cold., 189; and cases cited in 2 Abb., Nat. Dig., 286, No. 43. See, also, *Sprigg v. Bank of Mount Pleasant*, 10 Pet., 257.

But they could not have formally pleaded the statute of frauds, because the bill states an agreement in writing, and seeks nothing but an execution of that agreement through the enforcement of the vendor's lien; and, in such a case, a plea that there was no agreement in writing, is not proper: 1 Story's Eq. Pl., § 762. Consequently, if Summer, Barton and Jarrett were now before the Court, they could not, in any form, interpose the trust deed to Barton as a barrier in the way of complainant, for the obvious reason that the ninety-seven acres of land involved in this suit—with the possible exception of eleven acres, parcel thereof, as to which the proof is not clear—were not, in point of fact, conveyed in, but were expressly reserved out of the deed of trust.

The argument which has been so confidently pressed before us, that the contract between Summer and Francis was a parol contract, as to the sale of land, and can not be enforced, rests upon the assumption that such parol contract was void under the statute of frauds; but, in *Sneed v. Bradley*, 4 Sneed, 301, it was said that "it would be more correct to designate such contracts as voidable rather

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than absolutely void," and that "if the contract be fully set forth in the bill, and the defendant admits it in his answer, and submits to waive the statute of frauds; or, what is deemed as equivalent to a waiver, does not insist upon the statute as a defense, a specific performance of the contract will be decreed."¹

But the contract stated in the bill is a written contract, and the effect of Summer's answer, admitting the sale of the 97 acres and 5 poles of land, and expressly denying that they are included in the deed of trust to William Barton, (with an indefinite exception mentioned in the answer,) would be to enable this Court to set up the bond, or conveyance, so admitted, as a lost instrument, independent of the statute of frauds; and, it may be added, that the defendant, Alexander, if he were not clearly repelled on the grounds already indicated, could not, being a third person and a subsequent purchaser, interpose to arrest the execution of the contract, if it had been by parol, on the ground that the requirement of the statute has not been complied with, as Summer, the vendor, admits the agreement, and is willing to perform it, and the other real parties in interest are, apparently, willing to accept the performance: 4 Sneed, 305.

As none of the defendants are before this Court, but

¹See contra *Pipkin v. James*, 1 Hum., 325, 329; *Crippen v. Bearden*, 5 Hum., 129, 131; *Hurst v. Means*, 2 Swan, 594; *Acc. Cox v. Cox*, Peck, 455; *Hilton v. Duncan*, 1 Cold. 314; *Sheid v. Stamps*, 2 Sneed, 172; *Farris v. Caperton*, 1 Head, 608; *Wood v. Thomas*, 2 Head, 162; *Blair v. Snodgrass*, 1 Sneed, 27; *Wright v. Cobb*, 5 Sneed, 143; *Beard v. Bricker*, 2 Swan, 53; *James v. Patterson*, 1 Swan, 313; *Sullivan v. Ivey*, 2 Sneed, 489. See also, *Orand v. Mason*, 1 Swan, 136; *Lane v. Courtney*, 1 Heis., 332; *Raymond v. Huddleston*, Jackson, April 8, 1871.

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defendants Alexander and Fare, let so much of the Chancellor's decree be affirmed, as declares that they and each of them, are purchasers with notice. Let it be further adjudged that the Sheriff's sale and deed, under which they claim, are utterly null and void; and let this cause be remanded to the Chancery Court at Woodbury, to the end that, if complainants so desire, the original defendants, Barton and Jarrett, may, by a proper proceeding in said Court, be reinstated as defendants, and the precise boundaries of the land reserved in the trust deed be ascertained and defined by a decree of the Court; and also to the end that the execution of the decree heretofore entered in said court may be proceeded with, as to the parties not appealing, in such manner as the Chancellor may direct. The entire costs of this cause in this Court, and so much of the costs in the Court below as accrued by reason of their defense in said Court, will be adjudged against Alexander and Fare, the appellants.

JOSEPH BOGLE v. C. A. HAMMONS *et al.*

1. DURESS. *Fraud.* Where a deed for land was obtained, for Confederate Treasury notes, during the war, by a substitute in the Confederate army, by repeated threats of bringing the soldiery upon the maker, there being a military order against refusing to take it, and by statements that the penalty of refusing was hanging, and by promises to take the money back, or make it good as gold and silver, if it did not answer all purposes, it was set aside for duress and fraud.

Case cited and distinguished from this: *Rollings v. Cate*, 1 Heis., 97.

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2. **DURESS.** Where personal fear is aroused by threats, so as to compel a person to make a contract, or do an act, which he would not otherwise have done, such contract or act is utterly null and void.
3. **CONFEDERATE TREASURY NOTES.** *Account for value.* Where Confederate Treasury notes were received when they had a value, and retained, without showing what became of them, the party will be held to account for the value of the notes.
4. **SAME.** *Tender of back.* A failure to tender back Confederate notes, when they were of no value whatever, cannot materially affect a party's right.
5. **EVIDENCE.** *To discredit witness.* A witness cannot be impeached by showing trivial discrepancies as to collateral matters, nor by proving that others were present and did not hear what he states to have been said, nor by loose conversations, seemingly at variance with his evidence, to which his attention has not been properly called.

FROM CANNON.

In the Chancery Court at Woodbury, before B. M. TILLMAN, Ch.

ST. JOHN and FINLEY, for complainant, cited *Belotte v. Henderson*, 5 Cold., 474, 5; *Jones v. Thomas*, 5 Cold., 469; *Waller v. Parker*, Id., 479, 80.

J. S. BARTON, for defendants.

NELSON, J., delivered the opinion of the Court.

The complainant executed a deed of conveyance, bearing date 8th December, 1862, to Larkin W. and Elijah R. Hammons, minor children of C. A. Hammons, for the tract of land therein described, situate in Cannon county, and containing 65 acres and two rods, more or less, by estimation, as stated in said deed, for the consideration of nine hundred dollars; of which amount, the deed recites that eight hundred dollars had been paid, and the

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balance of one hundred dollars secured by the note of C. A. Hammons to the said L. W. and E. R. Hammons, due and payable 25th December, 1863, and for the payment of which a lien is retained on the face of the deed. The payment of eight hundred dollars was made in Confederate Treasury notes; and the object of the original bill, filed 24th April, 1866, and of the amended bill, filed 14th March, 1868, when considered together, is in brief, to have the deed annulled for failure of consideration, and because it is alleged the same was obtained by fraud and duress.

It appears from the record, that, during the late civil war, and up to the time of the execution of said deed, Cannon county was in possession, or subject to the control, of the Confederate military forces; and that the following order, issued by a military officer in command, was printed as a circular or hand-bill, and generally posted throughout the country, viz:

“HEADQUARTERS CAVALRY BRIGADE, }
“McMINNVILLE, July 25, 1862. } ”

“Any person who shall refuse to receive Confederate money, or shall say or write anything to depreciate the same, shall be subject to a fine and imprisonment, or confiscation of property, either or both, as the nature of the case may indicate. The asking of exorbitant prices for goods, or the commodities of life, such as would indicate a want of confidence in Confederate money, is prohibited; and any person so offending, shall be subject to fine and imprisonment, or confiscation of property, either or both, as the nature of the case may indicate.

“N. B. FORREST,
“Brig.-Gen., Commanding Brigade.”

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This order, it seems, was actively circulated throughout the country, and occasionally enforced, through the soldiery, by threats and arrests; and, for fear of the consequences, many persons received Confederate notes who would not otherwise have done so. According to the weight of evidence, the complainant was a Union man, and C. A. Hammons a Rebel, who had been hired as a substitute in the Confederate army.

Hammons, expecting to be soon put upon active duty, and, perhaps, to be engaged in the then approaching battle of Murfreesboro, became anxious to purchase the complainant's land, and to have it conveyed to his children, either to protect it against his creditors, or to provide for the possible contingency of his early death. Certain parol negotiations occurred between him and the complainant, from which it was manifest that the complainant, who was somewhat embarrassed in his circumstances, was quite unwilling to receive Confederate notes in payment, yet fearful to risk the consequences of a direct and positive refusal. Hammons, on the other hand, was equally determined to avail himself of the well grounded apprehensions of complainant, to take advantage of the circumstances which surrounded him, and to extort, from his fears, a conveyance of the land. Having received one thousand dollars, in Confederate notes, either for his services as a substitute, or as an agent to purchase hogs, he invested a portion of the money in that way, and told one of the witnesses, in substance and with an oath, that complainant had agreed to sell him the land, and that he would compel him to do so. He went to the house of complainant, who was engaged at the time in shoemaking,

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and proposed to give nine hundred dollars for the land in Confederate money. Complainant refused to take it. In the language of the witnesses, Hammons "then pulled out eight hundred dollars in Confederate money, and laid it on the lapboard." Complainant told him not to lay his money down there until he saw further about it. Defendant remarked that if they were going to make the trade, then was the time to make it; said repeatedly that, if the money did not answer all purposes, he would take it back, or make it as good as gold and silver; and, after he laid the money upon the lapboard, observed that "if a man refused to take this Confederate money, just report him to Gen. Forrest, and he would hang him four feet from the ground." He went off and left the money lying upon the lapboard; and the complainant afterwards executed the deed. It does not clearly appear how long the fears of complainant, thus produced, existed before signing the deed, but one of his daughters, proves that these fears continued "a right smart while—a month or two;" and that Hammons kept making his threats as long as he was a soldier, which was about that length of time. This witness states that she stayed with Hammons' wife about five weeks, "while he was a soldiering," and that while she remained there, he came home every day, with the exception of one week, during which he remained away.

One witness, who does not appear to be related to either of the parties, proves that in the Fall of 1862, he, the witness, was "backward about taking Confederate money, and Col. Hardy said to me, (him,) 'if you refuse to take that money I will carry you to headquarters quicker than you ever went;' and the penalty for

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refusing Confederate money is, they hang them four feet clear from the ground." Another witness proves that the cavalry, belonging chiefly to Forrest's and Morgan's commands, were "round there" in 1862; that they were passing through the country "frequently, every few days," and made threats that if the people refused to take Confederate money, Forrest would either confiscate their property or take them off and hang them. Yet another witness testifies that he was present when the order of General Forrest was posted up; that he saw orders similar to it "posted up around through the country;" that the soldiers who posted the order did not say a great deal about it, but did say that "the orders were strict, and the people saw their doom if they disobeyed them." Other witnesses prove that there was a general state of fear throughout the country; that the people generally were afraid to refuse Confederate money, and that they (the witnesses) received it through fear. This part of the evidence was properly objected to.

In the case of *Rollings v. Cate*,¹ determined at the recent term of the Supreme Court at Knoxville, we held that a mere general fear of offending the Confederate Government, by refusing to take Confederate Treasury notes in payments, could not be imputed as duress in private transactions, where no threats or force were employed, and that in order to constitute duress in its legal sense, it must appear that the party acted under some threatening of life, or member, or of imprisonment, or some imprisonment or beating of the party

¹ 1 Heis., 97.

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acting, or of his wife, with a view to procure the execution of the deed or other instrument, and that the danger existing or threatened, should affect the person or goods or property. In that case, there was no proof of beating, imprisonment or threats; no proof of any military order; no other or higher evidence than a vague, indefinite and unsatisfactory statement that there was "a general state of fear among Union men in regard to disobeying rebel rule, or refusing to take their money; and many Union men had been arrested;" which hearsay statement was objected to and held to be inadmissible in evidence.

But there is a marked distinction between that case and the case now under consideration. Here, a stringent military order is established by proof. Here, it is shown that the order was published throughout the country. The order, itself, contains a threat of fine, imprisonment and confiscation. It was issued by an officer of high rank, and circulated by soldiers who were in arms. It was not a mere *brutum fulmen*, but was vigorously executed, and created general trepidation and alarm. The defendant, Hammons, himself a soldier, artfully turned the order to his own private and personal advantage. He did not use it in aid of the cause which he had hired himself to support as a soldier, but employed it as a means of coercion, to compel a contract which he could not otherwise have obtained; and, with the view of arousing to the greatest extent the fear of his victim, actually misrepresented it, and threatened, with it and by its assumed operation, the life of the complainant, and not merely his imprisonment or the confiscation of his property. Con-

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tinuing to hold that vague and indefinite fears, which might have been common to all the citizens, are not sufficient to invalidate private contracts, we hold, also, that when a military order, such as has been proved in this case, was directly appealed to, and employed as a threat, or means of coercion, by one citizen against another, and his personal fear was thereby aroused and excited, so as to compel him to make a contract, or do an act which he would not have done but for such personal fear, such contract, or act, is utterly null and void.

From the evidence in this case, we have no doubt that the complainant executed the deed under the fear of death, or at least of imprisonment or confiscation; and, although it is not in proof that at, or immediately before, the precise moment of signing the deed, any threat was made, we are satisfied from the facts and circumstances appearing in the record, that the defendant did, in the first instance, by his threats, arouse the fear of death, imprisonment or confiscation; that he never disabused or sought to disabuse the mind of complainant of the impression thus created; but, on the contrary, continued from time to time, to deepen and enlarge them; and that the fear thus created and continued was present and existing when complainant executed the conveyance. The Confederate notes were left with him forcibly, and against his will, and in despite of his timid but earnest remonstrance. While he held only a title bond for his land, Hammons was the busy and active agent in employing his own counsel to prepare a deed to complainant in its place, and also to prepare a deed from complainant to his (Hammons') two minor sons, who had no agency in procuring

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it. He removed into the house on the premises before the complainant and his family had left it, where, it may be fairly presumed, he conducted himself with domineering insolence, and is expressly proved, he declared that complainant had been trying to get him to take the money back, but swore, with a blasphemous oath, that he did not intend to do so, and significantly announced, that "when he made a trade he made it." After complainant had removed from the houses, and probably after the Confederate forces had left the country, Hammons stated in the hearing of one of the witnesses, that "if the Rebs would come back, he had the other hundred dollars for old man Bogle," meaning, doubtless, that he would compel him to receive it in Confederate notes; as he had forced him to receive the eight hundred dollars.

Aside from the question of duress, it is apparent, from the evidence, that the defendant, Hammons, who was insolvent before he received the one thousand dollars in Confederate notes, perpetrated a fraud upon complainant, in assuring him that they were as good as gold; in promising him to take them back if they could not be used in the payment of his debts, and in refusing to do so when complainant offered to return them. It has been earnestly contended, in argument, that complainant did use \$405 of the Confederate "money" paid to him by Hammons, in a payment to Stone, administrator of Raney, from whom the land was originally purchased; but although it is in proof that Hammons was present at the time, or upon the day when the payment was made, it is not shown by the declarations of the parties or otherwise, that the "money" so paid was any part of

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the fund left by or received from Hammons; and it is in proof that complainant had received Confederate "money" from other sources. The witnesses do not testify as to the precise amount, but say that he had "a great roll of it;" and as that species of currency was quite abundant, it is more than probable he had acquired enough from other sources. It is also in proof that complainant spoke of investing the Confederate money in cattle and other stock, and that he made some small investments, and admitted that one hundred dollars of the amount had been received from Hammons. As the complainant did not tender the Confederate money received from Hammons with his bill, or at any time in the progress of the cause, it is quite probable he used the same or a part thereof, although it is shown that he had Confederate "money" on hand at the close of the war.

A tender of the Confederate "money," however, at or since the commencement of the suit, would have been an idle ceremony, as it had become utterly worthless. But it is in proof that at the time of the contract Confederate notes had a marketable or commercial value; and although it was small, it is equitable and just that as complainant does not show what became of the Confederate money he received, he should account for its value at the time he received it, and that defendant, Hammons, should account for the rents and profits of the lands, minus the value of any betterments, actually enhancing its value, which he has placed upon it since he took possession.

Other propositions have been vehemently urged in argument by the defendants; but after a very careful exam-

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ination of this voluminous record, and all the evidence, relevant and irrelevant, contained in it, we are unable to perceive that the credibility of any of the witnesses has been successfully assailed. There is no proof as to the general character of either of them, and the legal presumption is that all have testified to the truth. It would be useless to repeat here the names of the witnesses, or to particularize the statements which have been assailed. The evidence of persons who have been examined under oath can not be impeached, as seems to be the effort in this case, by showing trivial discrepancies as to collateral matters, especially when the witnesses examined for the purpose do not themselves make positive statements, and admit their own want of accurate recollection as to the facts. Nor can the positive statement of a witness that he heard a particular conversation, be disproved, as was attempted, by the statement of another witness that he was present but does not remember whether it occurred or not. Nor can the loose conversations of witnesses, which seem to be at variance with their depositions, be regarded as successfully impugning their veracity, without first calling their attention, as nearly as possible, to the time, place and circumstances of the supposed conversation, so as to give them an opportunity for explanation.

Let the decree of the Chancellor be affirmed, with the modifications above indicated.

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STATE OF TENNESSEE v. JOSEPH H. THOMPSON, *et als.*

1. PLEADING. *Non est factum.* A plea to a bond, that the defendant "did not undertake and covenant," is in substance *non est factum*, and must be sworn to.
2. SAME. *Judgments in County Court.* A plea of a recovery in the County Court of judgments to the amount of the penalty of a bond, which fails to show the nature of the proceedings pending in the County Court, by which it acquired jurisdiction to render judgment, is bad.
3. SAME. *Same.* Such a plea must set out the names of the parties to the judgments or decrees, and conclude with a verification by the record.

FROM BEDFORD.

This was a proceeding by motion in the Circuit Court of Bedford County, before JOHN W. PHILLIPS, J., against Thompson, as Clerk of the County Court of said county, and the other defendants as his securities upon his bond, "in all things faithfully to discharge the duties" of his office, on account of the failure of Thompson to make Revenue statements, and to pay over the revenue collected.

To this motion the defendants jointly pleaded:

1st. That they did not undertake and covenant, as the plaintiff in his motion hath alleged.

2d. That by the said bond, they nowhere undertook that the defendant, Thompson, would render a statement of the revenue that came into his hands, or ought to have come into his hands, to the Comptroller, or would pay over the revenue.

3rd. That the full amount of the penalty of the bond

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was recovered by decree of the County Court of Bedford county, August 4, 1868, by Rosannah C. Hardin and others, in the case of Harrison & Woods, administrators, and others, against Rosannah Hardin, and others, for \$9,156.50; and by D. P. Searcy, adm'r, for \$843.50, in the case of said Searcy against E. B. M. Norville, and others, said "Court having competent jurisdiction to render the same," having full jurisdiction of the subject matter, * * * as well as of the persons of the defendants; that they were rendered upon the identical bond and the only one on which these securities are liable, &c. That said decrees are in full force, etc., and are being enforced by execution, and concluding with these words: "and that no other judgments can be rendered against them on said bond."

4th. The same more briefly, and in general terms.

A motion was made to strike out these pleas, and a special demurrer filed, both of which were overruled. Issue was then taken on the pleas, and the case being tried, the motion was dismissed, and the District Attorney for the State appealed.

Attorney General HEISKELL, for the State, insisted that the first plea denying liability on the bond in general terms, was in substance *non est factum*, and must be sworn to, and is reached by the motion to strike out.

That the second plea is bad.

That the third and fourth pleas aver jurisdiction in the County Court, but do not state the facts. The County Court could only have jurisdiction by motion, to render judgment upon this bond; and in favor of private parties, could only render such judgment against the Clerk as a

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Commissioner to sell land. The only mode possible being by motion, a plea must show the validity of such judgment by averring every fact necessary to give the Court jurisdiction, and by showing that the record showed every such fact; for failure of the facts, or failure to state the facts in the record, either would make the judgment void.

This plea says the recovery was by decree. Certainly no decree can be rendered in a County Court against its Clerk, except in cases of sale of lands or slaves, and as Commissioner, not as Clerk. Such decree is rendered on motion, and subject to the rules as to motions: *Rucker v. Moore*, 1 Heis., 726. But such judgment only lies upon this bond, in the event there was no special bond as Commissioner, Code, 329, 761, and that fact must appear by the record, else the decree is void. There is an averment that this is the only bond on which these sureties are bound, but that is a negative pregnant as to the Clerk himself. An averment that the special bond did not exist, would not show a good judgment, unless it also averred that the non-existence of the bond appeared by averment in the judgment. The non-existence of the special bond is the fact upon which the jurisdiction of these sureties depends.

Possibly the want of the allegation of the specific facts might be dispensed with, if the plea averred that the matters stated in the case appeared by the record of the County Court; but this averment, which is of substance in a case where the record must state every fact, is not in this plea. The plea avers that the Court had jurisdiction, but it does not aver that the record shows

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it even by the general averment *prout patet per recordum*.

If this plea is good as to the securities, it is bad as to the Clerk; for he is liable for his own default beyond the penalty of the bond. The bond, as to him, is only evidence of his holding the office and being subject to the motion. As to the sureties, it is the only obligation, and the penalty is the limit. The plea is bad as to him; but being joint, if bad as to him, it is bad as to all. 1 Ch. Pl., 464, 481. So held in N. Car., 3 Dev. & Bat., 70.

There is no averment that these sureties have paid anything. If the Clerk pays the penalty, that would not release them. It is admitted that the authorities are in conflict on this point, but reason is on this side. The Code does not affect this. It is negative, that one recovery shall *not* bar until the penalty is exhausted. It does not say how it shall be exhausted.

ED. COOPER, for defendants, insisted that the third plea did sufficiently aver the mode in which jurisdiction was acquired by the County Court; that the objection, that the plea did not aver the non-existence of the special bond, was not well taken; that the judgment being of a competent Court, having jurisdiction of the parties and the cause, it could not be collaterally attacked, and that the averment in the plea, that the judgment is in full force, is an express allegation of its validity; that the plea does not show that this judgment was by motion, but by decree. It avers jurisdiction by the Court

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of the person. No intendment can be made against it on demurrer. It follows, that the County Court were satisfied of the liability, and rendered the judgment, and the judgment exhausts the bond. If so, no recovery can be had on it, and the plea is good.

That the plea is good as to Thompson, as well as the sureties in answer to a joint motion against all. A separate motion would lie against Thompson alone, for amounts beyond the penalty of the bond; but judgment could not be rendered in this joint proceeding, and this judgment could not be pleaded in bar of a separate motion.

W. H. WISENER & SON, with him.

TURNER, J., delivered the opinion of the Court.

The judgment of the Circuit Court is erroneous.

The first plea is, in effect, a plea of *non est factum*, but is not sworn to.

The third and fourth pleas are fatally defective in several particulars.

Defendants undertake to plead in bar of this motion, a recovery in the County Court of judgments amounting to as much as the penalty of the bond on which the motion is based. They fail to show by their plea any proceedings pending in the County Court, giving the Court jurisdiction to render judgment or pronounce decrees.

The pleas do not notify the Attorney General of any legal defense to the motion.

The pleas are argumentative and conditional. The.

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names of the parties to the judgments or decrees attempted to be pleaded are not sufficiently set out.

The pleas do not conclude with a verification by the record.

For these reasons the demurrer should have been sustained.

The judgment of the Circuit Court overruling the demurrer, is reversed; the first, third and fourth pleas dismissed; and the case remanded for proper pleas and a new trial.

S. A. HOPKINS v. S. B. SPURLOCK.

1. EQUITY PLEADING. *Answer. When responsive.* Charge, that a defendant had admitted that he collected from an absconding debtor \$500, which he appropriated to other debts than the one specified in the bill, on which complainant was surety, and that the debtor had means to pay. Answer, that the \$500 was collected, but it was appropriated to other debts, on which complainant was surety; and that he was unable to collect the note in question, after exhausting all remedies by law or otherwise. Held to be responsive.
2. SURETY. *Notice to sue.* If a surety to a note notify the holder to sue the principal, when by so doing the money could be made, his failure to sue discharges the surety. Citing 10 Yer., 362.

FROM WARREN.

In Chancery at McMinnville, before J. P. STEELE, Ch.

SAVAGE, for complainant, cited 2 Yer., 476; 10 Yer., 362; 5 Hum., 370. That the answer is in avoidance, as

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to notes not mentioned in the bill, 2 Cold., 63; 5 Sneed, 544; 1 Tenn., 258; Heis. Dig., 531, 532, 537. It is evasive, and substantially admits charges, 10 Yer., 84; 8 Hum., 46. Complainant having given the information, it was a fraud to appropriate the fund collected by means of it to the debts of others, 9 Hum., 123; King's Dig., 10,077, 10,122; 5 Hum., 492; 4 Cold., 608.

JOHN L. SPURLOCK, for defendant.

NICHOLSON, C. J., delivered the opinion of the Court.

The bill, in this case, was filed to enjoin a suit at law, in which defendant was seeking to collect from complainant a note of \$130, made by one Cummings, and to which complainant was security.

It is alleged that Cummings was indebted to complainant for two notes, one for \$130, and the other for \$200, on both of which complainant was security; that complainant, who lived at McMinnville, finding out that Cummings was about removing to Missouri with his property, procured a letter to be written to defendant, then in Nashville, notifying him that Cummings would pass through Nashville at a specified time with his property, and that he must make the money out of Cummings, and that he need not look to complainant to pay the debts of Cummings. It is further alleged, that defendant had admitted that he collected from Cummings \$500, as he passed through Nashville, which he had appropriated in payment of other debts due defendant from Cummings, and that Cummings had means to pay. Upon

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these allegations, complainant insists that he is discharged from the payment of the note for \$130, sued on.

Defendant admits, in his answer, that he held the two notes, of \$130, and of \$200, on Cummings, with complainant as security, as alleged, as well as others on which complainant was liable, and that Cummings had paid the \$200 note, and all the others, except the one for \$130. He admits he received a letter from complainant, requesting him, especially, to secure the debt of \$200, on which complainant alone was security, but he does not admit that the \$130 note was referred to. He answers, that, after using strict vigilance and diligence, he succeeded in collecting \$500 from Cummings, which he appropriated to several notes due defendant, on each of which complainant was liable, and amongst them was the \$200 note specified in the letter; and that he was unable to collect from Cummings the \$130 note, after employing all necessary diligence, and exhausting all remedies at law or otherwise.

The only testimony in the case is found in the deposition of A. W. Hopkins, who states that she wrote a letter to defendant, at the request of complainant, in which he notified him that Cummings would pass through Nashville, and that he must make his money out of him on the notes on which complainant was security, as Cummings had means to pay it, and it could be made of him.

There is no other proof, the letter referred to not being in the record.

It is well settled, that, if a surety to a note notifies the holder to sue the principal, when by so doing the

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money could be made, his failure to sue may be insisted on by the surety as a discharge of his liability. 10 Yer., 362. But, to make the discharge effective, it must not only appear that the holder of the note failed to sue, but that the money could have been made by proper diligence. In this case, the notice to make the money is shown, and it is also shown that \$500 was collected; but the allegation is, that it was appropriated to other debts. The answer is responsive, that all the money was appropriated to debts on which complainant was liable, including the \$200 note on which complainant alone was security, and which was specified in the letter as the debt to be specially paid. There is nothing, either in the answer or in the letter, or remembered by the writer of it, which shows that there was any special direction as to paying the \$130 note. It is alleged that Cummings had means to satisfy all the debts on which complainant was liable. The defendant answers the allegation, by saying, that he was unable to collect the \$130 note, after exhausting all remedies by law or otherwise. There is no proof contradicting this statement.

We do not think the facts bring the case within the rule of law before stated, as to the discharge of a surety. The decree of the Chancellor will, therefore, be affirmed, with costs.

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A. DENNY v. W. L. STEAKLY and S. C. GOFF.

1. **VENDOR'S LIEN.** *Waiver.* Taking a check or note, not by way of security, but as a mode of payment of the price of land, is not a waiver of the lien, but on failure of payment the lien may be enforced.¹ A conveyance afterward, and before the non-payment was ascertained, is not a waiver, though the deed recite that the purchase money is paid. *Marshall v. Christmas*, 3 Hum., 616.
2. **SAME.** *Double security.* A vendor of one tract having taken in payment a note which was a lien on another tract of land, on non-payment may proceed to enforce his lien on both tracts.
3. **CONFEDERATE CURRENCY.** *Post-office check.* A post-office check on the Confederate States, taken in payment; the holder failing to collect, would only be entitled to recover the value of what he would have received on the check, i. e., the number of dollars called for, in Confederate notes.
4. **CHANCERY PRACTICE.** *Decree for sale.* No sale of lands will be decreed to pay off vendor's lien, until the amount is ascertained.

FROM WARREN.

In the Chancery Court at McMinnville, J. P. STEELE, Ch., presiding.

J. H. SAVAGE, for complainant, on waiver of lien, cited 2 Yer., 84; 2 Hum., 258; 1 *Id.*, 538; Meig's Dig., 1724. It was the intent of the parties not to waive the lien, as proved. Transfer by delivery in payment, unless upon contract to take it at his own risk, does not prevent action on the original obligation. 3 Wal. U. S., 37; Ch. on Bills, 144 n., 6 Am. ed.

On the payment by P. O. check, he cited 4 Hum.,

¹ See *Carter v. Sims*, post, 166; *Hines v. Perkins*, post —.

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186; Ch. on Bills, 144. It was taken upon a promise to take it back if bad.

W. E. B. JONES, for defendant, insisted that making the deed is an estoppel. The P. O. check was illegal, citing *Potts v. Gray*, 3 Cold., 468; *Wright v. Overall*, 2 Cold., 337; *Henly v. Cage*, 3 Cold., 472; *Jones v. Thomas*, 5 Cold., 465. Defendant not liable on the note, Story on Pr. Notes, 117, 118, n.; *Moore v. Wier*, 3 Sneed, 46; *Kirkpatrick v. McCullough*, 3 Hum., 171; *Bank v. Smizer*, 1 Sneed, 501. Complainant would not be bound to exhaust the lien on the Goff land before going back on Steakly. Waiver of lien, 3 Hum., 616.

NICHOLSON, C. J., delivered the opinion of the Court.

In February or March, 1863, complainant sold to defendant, Steakly, a tract of land in Van Buren county, at the price of \$3,000. Sixteen hundred dollars were paid in Confederate Treasury notes, four hundred dollars in a post-office draft of the Confederate Government, and a note of one thousand dollars on defendant, Goff, which was given for land sold by defendant, Steakly, to defendant, Goff. This note was payable in current notes of South Carolina and Georgia banks, and was transferred to complainant, in payment for the land, without indorsement. Complainant, at the time of the sale, executed to defendant, Steakly, a bond for title, and in July, 1863, he executed to him a deed in fee simple.

Upon failing to collect the post-office draft, or the note for one thousand dollars, complainant, in August, 1865, filed his bill against defendants, to enforce his

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vendor's lien against the land sold by Steakly to defendant, Goff, for the satisfaction of the note for \$1,000, and against the land sold by complainant to defendant, Steakly, for the satisfaction of the post-office check for \$400, and any residue of the note for \$1,000 that might not be made out of the land sold by Steakly to Goff.

Upon the view which we take of the law, arising upon the foregoing statement of the facts, we pass over without comment the action of the court below as to the demurrer filed, as well as the testimony in regard to the terms on which the post-office check was received as payment. It is only necessary to remark that complainant realized nothing from the check, and that it proved to be of no value. We may further remark, that whilst there is some conflict in the testimony as to whether complainant received, and defendant, Steakly, paid, the note of \$1,000, with the understanding of both that complainant was to have a lien on both tracts of land, there is none as to the fact that complainant made no express waiver of his vendor's lien.

It is too well settled to require the citation of authorities, that whenever land is sold on time, or when the price is not paid down, the vendor has an implied lien for the purchase money, whether the legal title is conveyed or not, unless he expressly waives his lien, or does so by implication, in taking other security for the unpaid purchase money. In the case before us, complainant received the post-office check and the note of \$1,000, not by way of security, but in payment of the residue of the purchase money. The taking of the note and check being only a mode of payment, was no waiver,

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either express or implied, of his lien. *Marshall v. Christmas*, 3 Hum., 616; 1 Sch. & Lef., 132.¹ It follows that complainant had a lien on the land sold to defendant, Steakly, for the amount of the post-office check and the thousand dollar note, which he could enforce upon his failure to receive payment thereof. He also had a lien for the satisfaction of the thousand dollar note, out of the land sold by Steakly to Goff, the legal title to said land not having been conveyed to Goff. Nor is the lien of complainant lost or affected by his conveyance in July, 1863, of the legal title to defendant, Steakly, of the land sold to him by complainant. Nothing was then said or done indicating a waiver of his lien; nor does the recital in the deed, that the purchase money was paid, amount to a waiver, as the fact is made to appear that the purchase still remains due. •

Complainant, therefore, has a right to have both tracts of land subjected to sale for the residue of the purchase money; the proceeds of the sale of the tract sold by Steakly to Goff applied to the satisfaction of the note for \$1,000, and the proceeds of the other tract to the satisfaction of the \$400 in the check, and any residue on the note for \$1,000, not made out of the other tract.

But before any decree can be made for the sale of the two tracts of land, it will be necessary to ascertain the value of the post-office check, treated as Confederate money, at the time the same was paid to complainant, and also the value of the note for \$1,000, payable in

¹ See *Carter v. Sims*, post, 166; *Hines v. Perkins*, post —.

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current bank notes on the State of South Carolina, and the State of Georgia or its branches, at the time said note was payable.

The decree below will be reversed, so far as it conflicts with this opinion; and the cause remanded to be proceeded in as herein indicated. The costs of this Court will be paid by defendant, Steakly.

W. A. and JOHN HICKERSON v. WILLIS BLANTON & Co.

1. **VENDOR'S LIEN.** Sale of land by deed, reserving a lien; levy on the land by execution, before registration of the deed, as the property of the vendor, and sale and purchase by creditor on the 2nd of April, 1860. He bought and took deed from the vendee on the 8th of March, 1861, and entered upon the land, but took no Sheriff's deed until the 25th of November, 1865. Held, that, as against the lien of the purchase notes, in the hands of the assignees of the vendor, though the execution lien was superior, it was waived by the purchase from the vendee. *Perry v. Calhoun*, 8 Hum., 551.
2. The assignees having taken judgment on one note, and being about to take judgment on another, the creditor holding a note on the vendor, due, and two not due, to defeat the assignee from reaching the land by levy, took new notes, and procured the vendor to confess judgment, and levied on the land and bought it at execution sale, with the avowed purpose to befriend the vendor and vendee. Held to be a fraud upon the assignees of the purchase notes.

Code cited: § 1759.

FROM COFFEE.

In the Chancery Court at Manchester, before B. M. TILLMAN, Ch.

JORDAN STOKES, for complainants, insisted that com-

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plainants were entitled to the vendor's lien, citing *Graham v. McCampbell*, Meigs, 52; *Cleveland v. Martin*, 2 Head, 128; *Thompson v. Pyland*, 3 Head, 537. That Blanton drew the deed from Hodge to Daniel, and so had notice; that he held under the deed, and was bound by its recitals; citing *Sikes v. Basright*, 2 Dev. & Bat., 157; *Phelps v. Blount*, 2 Dev., 177. Blanton's judgments fraudulent and void under Code, 1759. Blanton being purchaser, judgments may be attacked for fraud, in this case, *Waite v. Dolby*, 8 Hum., 406; *Hofner v. Irvin*, 4 Ired. L. R., 529; *Lee v. Crossna*, 6 Hum., 281; *Jennings v. Pray*, 8 Yer., 85; *Trotter v. Nelson*, 1 Swan, 7; *Keeling v. Heard*, 3 Head, 592. Deed from Daniel an abandonment of the Sheriff's sale; they are antagonistic, citing *Alley v. Carroll*, 3 Sneed, 110. Estoppel, *Perry v. Calhoun*, 8 Hum., 551; *Norman v. Morrow*, 4 Dev. & Bat., 448, 9; *Hitchcock v. Carpenter*, 9 Johns., 344; *Hitchcock v. Harrington*, 6 Johns. R., 290; *Collins v. Terry*, 7 Johns., 278; *Murphy v. Barnett*, 2 Murp., 291; *Johnson v. Watts*, 1 Johns., 230; *Ives v. Sawyer*, 4 Dev. & Bat., 51; *Gilliam v. Bird*, 8 Ired., 280; *Hassell v. Walker*, 5 Jones, 270; *Rochell v. Benson*, Meigs, 3; *Royston v. Wear*, 3 Head, 8. Claims of Blanton all the product of combination and fraud. He stands as if Hodge and Daniel had made the deeds. In such case, complainants' equity is paramount, *Berry v. Wallen*, 1 Tenn., 187; 1 Sto. Eq. Jur., § 395, 6. Registration law of no effect in this case, 1 Sto. Eq. Jur., 397, 8.

IRABY C. STONE, for defendant, Blanton, insisted that Blanton, as a creditor of Hodge, could sell the land un-

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der the execution, whether he had notice or not of the deed to Daniel, Meigs' Dig., 1656, sub-sec. 4; 4 Hum., 484; Code, 2075. That he could abandon the deed from Blanton, and claim under the Sheriff's deed, citing 8 Hum., 551. Blanton has the legal title, with equal equity. Estoppels not favored, Greenl. Ev., § 22; 12 Ed., by Redfield.

NICHOLSON, C. J., delivered the opinion of the Court.

On the 11th of December, 1857, Wm. Hodge sold and conveyed the land in controversy to James P. Daniel, for \$1,600, and took his notes, payable at one, two and three years, for the payment of which a lien was retained in the deed. Daniel failed to have his deed registered until the 5th of October, 1859. The deed and notes were written by Willis Blanton, who was a subscribing witness to the deed, and who proved its execution before the Clerk of the County Court on the 4th of January, 1859. Two of the notes of Daniel were transferred by Hodge to complainants, who have obtained judgments thereon, and who now claim that they are entitled to the vendor's lien on the land.

This claim is contested by Willis Blanton, on two grounds: First, on the 8th of March, 1861, Blanton bought the land from Daniel, took his deed, with covenants of warranty, and went into possession under this deed; second, on the 8th of September, 1859, Hodge confessed three judgments before a Justice of the Peace, in favor of Blanton, on which executions issued on the 9th of September, 1859, which were levied on the land in controversy on the 12th of September, 1859. The land

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was condemned at the January Term, 1860, of the Circuit Court, and sold on the 2nd of April, 1860, when Willis Blanton was the purchaser; and on the 25th of November, 1865, the Sheriff executed a deed to Blanton for the land. He now claims to hold the land under the Sheriff's deed.

It is manifest that Blanton cannot resist the lien of complainants, by virtue of his deed of March, 1861. He was not an innocent purchaser without notice. He wrote the deed from Hodge to Daniel, was a subscribing witness to it, claims title under it as purchaser from Daniel, and was affected with notice of the lien retained on its face.

But if the lien of Blanton's levies on the land on the 12th of September, 1859, was superior to complainants' lien, by reason of the non-registration of the deed of Hodge to Daniel until the 5th of October, 1859, the validity of his superior lien would be lost by his afterwards buying the land from Daniel, and by his holding and claiming title under such subsequent purchase. This fact, together with the other circumstances of the case, amount to a waiver and estoppel of his claim, under his purchase at the Sheriff's sale. *Perry v. Calhoun*, 8 Hum., 551.

Another question, however, is, whether the judgments on which Blanton procured the land to be levied on and sold, were fraudulent as against complainants, under section 1759 of the Code. In that section, it is enacted that "every bond, suit, judgment or execution, had, or made and contrived, of malice, fraud, covin, collusion or guile, to the intent or purpose to delay, hinder or defraud cred-

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itors of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, * * * * * shall be deemed and taken only as against the person, his heirs, successors, executors, administrators and assigns, whose debts, suits, demands, estates, or interests, by such guileful and covinous practices as aforesaid, shall or might be in any wise disturbed, hindered, delayed or defrauded, to be clearly and utterly void; any pretense, color, feigned consideration, expressing of use or any other matter or thing, to the contrary notwithstanding."

The law sanctions and commands diligence and vigilance on the part of creditors, in securing their just demands. But in the race amongst them for priority, it discountenances and forbids all resorts to covinous, guileful or fraudulent devices or practices. The section of the Code quoted, which is a copy of the Act of 1801, was intended to secure entire fairness amongst creditors in their efforts to secure their debts. Did Hodge, Daniel and Blanton collude together, and by covinous and fraudulent devices and practices, procure the judgments to be rendered against Hodge, with the purpose of hindering or delaying or defeating complainants in the enforcement of their lien on the land in controversy? The facts proven satisfy us that this question must be answered in the affirmative.

Complainants were known to Blanton, and Hodge, and Daniel, as creditors of Daniel and Hodge, and as owners of the notes for the purchase money of the land. It was known to them that one of the notes was in a judgment, and that the other would be in a judgment soon. It appears that Blanton held three notes on Hodge, one due, and the other two not due. For the

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avowed purpose of preventing complainants from reaching the land by levy, he proposed to Hodge to give up to him his two notes not due, to deduct the interest and take new notes: and that Hodge should immediately confess judgments, and that executions should be immediately levied on the land as Hodge's property. This would defeat the lien of complainants, as Hodge's deed for the land to Daniel had not then been registered. Blanton said to Hodge that his object was to prevent complainants from levying on the land, and thereby befriend Hodge and Daniel. And in March afterwards he took a conveyance from Daniel of the same land, knowing that Daniel had not paid the purchase money. It would be difficult to conceive a more artfully contrived device than was in this way attempted to be practiced by all three of the parties to defeat the superior lien of complainants.

Hodge has been twice paid for his land. Daniel pockets the money received from Blanton, if any was paid, which belongs of right to complainants; and Blanton has secured a bad debt, and become the owner of the land, leaving complainants with worthless executions against two insolvent men.

These are the results of Blanton's contrivances to befriend Hodge and Daniel, to procure the land for himself, and to overreach and defeat the lien of complainants, which was his avowed object.

The Chancellor's decree annuls and vacates the conveyances resorted to for effectuating the scheme of fraud, and restores complainants to their lien. We affirm his decree, with costs.

William Carter v. Lucinda J. Sims *et als.*

WILLIAM CARTER v. LUCINDA J. SIMS *et als.*

1. VENDOR'S LIEN. *Subrogation of surety. Sub-vendee. Assignment of Note. Priority.* A vendee of land, with a lien reserved, sold to a sub-vendee a part of the land, and transferred to his vendor notes of his vendee for purchase money, which were entered as credits on his own purchase notes. A surety on notes for the original purchase, who had made payments, was held to have a lien preferred to the lien of the vendor, on the land sold to the sub-vendee.
2. DECREE OF SALE. *To bar Redemption.* A sale of land, without redemption, ordered by a decree which does not show that the credit is allowed on application of the complainant, is void, and will, on appeal taken after it is made and confirmed, be set aside, and a re-sale ordered

FROM WILSON.

In Chancery at Lebanon. The transcript does not show what Judge was sitting when the decree of sale was made. HENRY COOPER, J., entered the decree confirming the sale, etc. JOHN P. STEELE, Ch., rendered the decree upon the merits.

The clause in the decree for sale referred to in the opinion, which orders the sale, is as follows: "Therefore, the Court is content to order the sale of the last mentioned part of said land, the sixty-five acres, more or less, remaining unsold, on a credit of six, eighteen, and twenty-four months, without equity of redemption."

A sale was made February 12, 1867, at which Wm. Carter became the purchaser, which was reported to the April Term, 1867, and confirmed. The decree appealed from was entered at December Term, 1867.

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JAS. J. TURNER and E. I. GOLLADAY, for the complainant, Carter, argued that Beard accepted the two notes of Odom, and credited on each of the two notes of Sims the amount of one of Odom's notes, and then transferred these notes, they being the only ones outstanding, with the credits on them, to Ragland, to whom they passed as the only existing liens on the land. That Carter, the surety, paid these notes, and was subrogated to the rights of Ragland, against whom Beard was precluded from setting up his lien; that Carter was thrown off his guard by the credit, and prevented from taking steps to secure himself.

They cited as to vendor's lien: 2 Head, 131, 2; 3 Head, 539; *Fogg v. Rogers*, 2 Cold., 293; 5 Yer., 205; 7 Id. 9; 10 Hum., 374.

A lien once waived, cannot be enforced: 32 Ill., R., 66; nor can one enforced for part: 4 Sneed, 346.

Subrogation: 4 Hum., 319, 320; 2 Head, 202; *Id.*, 549; 2 Cold., 91, 93.

Notes received in payment: 2 Parsons on Bills and Notes, 150 to 158; *Union Bank v. Smiser*, 1 Sneed, 501; 8 Yer., 176; 21 Pick., 231.

MOTLEY, for Beard, cited 9 Hum., 508.

CANTRELL, for Sims' heirs, insisted that the sale of the land without redemption, was void: Code, 2124; *Burrow v. Henson*, 2 Sneed, 658. That the sale of Odom's land, without answer or *pro confesso*, was void: *Wright v. Wilson*, 2 Yer., 294; Code, 4369, 4373; 1 Danl. Ch. Pr., 570; *Reese v. Woodruff*, 4 Johns. Ch. 547.

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TURNEY, J., delivered the opinion of the Court.

In March, 1859, Daniel Beard sold to P. J. Sims a tract of land in Wilson county, of one hundred and thirty-one acres, for the sum of \$2,620; two hundred dollars in cash, the balance secured by three notes of Sims', with William Carter and Alfred Bass, securities, due respectively 25th Dec., 1859, 1860 and 1861; the first for \$673.33, and the other two for \$873.33 each. Beard made a deed to Sims, retaining a lien for the security of the purchase money. The deed was executed and registered 19th March, 1859. In October, 1859, Sims sold sixty-five acres of the land to David Odom, for \$1,625, Odom executing his notes for the purchase money, and taking bond for title. Odom sold to William Smart.

On the 30th of August, 1860, P. J. Sims transferred and delivered to Beard two of the notes of Odom, each for \$541.66, in part payment of the money owing on his purchase. Sims died intestate and insolvent, in 1863. Carter, one of the securities, paid off one of the notes of Sims to Beard, to an assignee of Beard, and from an imperfect record, we think it probable he paid an additional amount as security for Sims. In March, 1866, Carter filed his bill, charging that he had paid the second and third notes in part, asking that a lien for his benefit to the amount paid by him be declared on the tract of land, and that it be sold, etc.

Odom, who is made defendant, answers and resists the lien of Carter, until he shall have been indemnified for

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the payments made by him, or for which he may be liable on account of his notes to Sims, transferred to Beard.

Beard filed a cross bill, in which he claims a lien on the entire tract, for the original purchase money, and insists that the two notes of Odom, transferred by Sims, are a lien on the sixty-five acres. An account was stated, ascertaining the amount due Beard. The report shows that there is due him (Beard) \$1,113.06, and that the amount consists of the two Odom notes.

The pleadings all show that Beard received these notes in part payment, and actually entered them as credits on the notes of Sims, on which Carter was security.¹

The Chancellor decreed that, for these Beard had the prior lien. This was error. Beard received them as payments, and is bound by it. The security of Sims, and Sims himself, were discharged from liability to that extent.

It appearing that these notes were the only outstanding debts due to Beard, and that Carter as security had paid portions of the purchase money agreed to be paid by Sims to Beard, he is entitled to be substituted to the lien of Beard to the extent of the payments by him, and this lien is superior to all others. Beard has his lien upon such equity as Odom acquired by his purchase and title bond from Sims, but must be postponed to Carter.²

The sale, without the equity of redemption, is not authorized, as appears from the decree itself, and is void.

The land will be re-sold, and the proceeds applied, first,

¹ See *Denny v. Steakly*, ante, p. 156.

² See *Trent v. Kyle*, 1 Heis., 663.

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to the payment to Carter of the amount paid by him for Sims. The bill of Beard, as to Carter, is dismissed with costs; it may be retained to reach such interests as Odom may have after Carter is paid.

It is intimated that the proper parties are not all before the Court. The cause is remanded for the execution of a decree under this opinion, and if deemed necessary, any nominal party may be brought in.

WILLIAM H. CHEEK, in his own right, and as Administrator of EPHRAIM CHEEK, deceased, v. JOHN R. JAMES, Chairman, etc., to the use of ISAAC G. B. CHAPMAN.

1. LOST INSTRUMENT. *Affidavit. Who qualified to make.* The affidavit of loss of bond, under the Code, 3901, 3903, must be made by a person having knowledge of the facts. An affidavit made by a person who could, on account of his tender years, have had no knowledge of its execution, is bad. The contents of a lost apprentice bond can not be proved by a Chairman of the County Court, stating that he does not recollect much about the matter, and arriving at the contents from the usual form in such cases.
2. SAME. *Search required to admit secondary proof.* Proof by a Clerk of the Court, that since the case was called for trial he had examined the papers in his office labeled 1851, (the date of the bond,) and did not find the bond, is not proof of a sufficient search to admit secondary evidence.

Code cited: 3901, 3903.

FROM SMITH.

In the Circuit Court, before A. McCLAIN, J.

William H. Cheek, Adm'r, v. John R. James.

W. H. DEWITT and J. B. LUSTER, for plaintiff in error.

S. M. FITE, for defendant.

TURNEY, J., delivered the opinion of the Court.

An action of covenant was commenced in the Circuit Court of Smith county, by the defendant in error, against the plaintiff, upon, as alleged in the declaration, a lost bond executed by the intestate, Ephraim Cheek, with W. H. Cheek as his security, to the Chairman of the County Court, in consideration of the apprenticeship by said court, to the intestate in his lifetime, and in 1851, of Isaac G. B. Chapman, a minor orphan, about six years old. The declaration makes profert of a copy of the bond. There was verdict and judgment for the defendant in error, and an appeal in error to this Court.

There are eight pleas filed to the declaration, among them a plea of *non est factum*. Under this plea the burden was upon the defendant in error to shew the execution of the bond, its loss and contents.

Code, 3901, provides: "Any lost instrument may be supplied by affidavit of *any person acquainted* with the facts, stating the contents as near as may be, and that such instrument has been unintentionally lost or mislaid," *etc.* § 3903 provides: "If the instrument is one which the law requires should be denied under oath, the affidavit produced before or at the trial will be sufficient to establish the claimant's right, whether he is plaintiff or defendant; and if denied under oath, or otherwise put in issue, may be established by competent evidence of its contents."

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In this case, neither the rule prescribed by the Code, nor that of the common law, has been observed.

The affidavit of the loss and contents of the bond is made by the defendant in error, Isaac G. B. Chapman, who is shown to have been between five and eight years old at the time he was apprenticed, and at the time the bond is alleged to have been executed. He does not show himself to have been there, or to have afterwards become acquainted with the facts; he does not, in fact, state that such bond was ever executed, and simply states that he "believes the copy herewith filed and referred to in the declaration is a substantial copy."

It would have been remarkable for a boy between five and eight years of age to have remembered anything of the contents of a bond executed under the circumstances of this alleged one, and there is no pretense that he ever saw it or read it after that time. We must infer he could not have read it, as he subscribed the affidavit with his mark.

The testimony of John R. James is taken; he proves he was Chairman of the County Court in 1851; that he was present, some time in 1867, when E. W. Turner, the Clerk, was searching for the bond, but that it was not found while he was present in the Clerk's office; that he was present as Chairman when Chapman was apprenticed; don't recollect much about the circumstances. With this for his premises, the witness is allowed by the Court to suppose rather extensively, and to think very much at will.

This witness totally fails to prove, directly or sub-

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stantially, any material fact competent for consideration by a jury. He arrives at the contents of the bond in question from the usual form in such cases.

The Clerk of the County Court was introduced, and proved that he had been Clerk a month or two; that since the case was called for trial he had examined the papers labeled, 1851, and did not find the bond. This Clerk went into office sixteen or seventeen years after the time the bond is said to have been executed.

Neither the Clerk who was in office at the time, nor the other members of the Court with James, are examined.

The entire proof as to the execution, loss and contents of the bond is illegal. The testimony upon these subjects shows that if these facts exist at all, there is better proof of them, than that offered and relied on even by these witnesses. The search for the lost instrument contemplated by law has not been made.

There are other errors, both in the admission of testimony and the charge of the Court, unnecessary to be noticed, as we suppose their recurrence upon another trial highly improbable.

Reverse the judgment.

Nathan J. C. Allen *et als.* v. James McCullough *et als.*

NATHAN J. C. ALLEN *et als.* v. JAMES McCULLOUGH
et als.

1. **MARRIAGE.** *Liability of husband for wife's debts.* By marriage with a female guardian, the husband becomes responsible for all the sums for which she is then chargeable, and for all that she becomes liable for during the coverture.
2. **SAME.** *Same. Wife's guardianship.* If she continues to act as guardian during coverture, he is responsible, whether it be proper for her so to continue to act or not.
3. **SAME.** *Same. Divorce does not relieve.* A husband, by divorce, is not relieved from liability for the wife's debts, as in case of the dissolution of the relation by death; but he continues liable, as if the marriage had not terminated.

The Code, 2471, preserving "the rights of creditors who became such before the decree (of divorce) was pronounced," has the effect that the creditors of the husband or husband and wife, who became such at any time during the marriage, are not precluded from collecting their debts out of the husband, or out of the wife's property to which his marital rights had attached, by reason of the divorce *a vinculo*.

4. **SAME.** *Same.* The husband's liability for the wife's debts does not depend on the amount of her property received by him.
5. **SAME.** *Assumpsit by husband.* If a husband, released by the wife's death from the debt of the wife, assume to pay it, it will create a valid obligation.
6. **DIVORCE.** *For cause existing at marriage.* It seems that, under the Code, 2448, a divorce may be granted, declaring the marriage void *ab initio*, for three out of the nine causes.¹
7. **CHANCERY PRACTICE.** *Revivor.* Revivor *in futuro*, on producing letters before the C. & M. A revivor was made in this case before qualification, in the name of such person as may be qualified as administrator, from and after the filing of the letters.

¹ It is worthy of consideration, whether the Legislature did not mean to avoid this very thing, with its results, bastardizing issue and avoiding acts during the marriage, and to place all divorces on the same footing, operating *in futuro*.—REP.

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8. **SAME.** A revivor of a decree by consent, precludes a defense against it, accruing after the decree, and before the consent order.

9. **SAME.** *Infant. Consent as to.* An agreement made in the progress of a cause, clearly for the benefit of infants, may be the basis of a decree, without a reference to report whether it is beneficial.

DOWER. *Divorce.* Code, 2472 to 2477, 2398, construed. Code cited, 2979, 3107, 2471, 2489, 2493, 2546.

Cases cited; on divorce, *Ames v. Norman*, 4 Sneed, 683; *Gillespie v. Worford*, 2 Cold., 632. On final decree and appeal, *Meek v. Mathea*, 1 Heis., 534; *Harrison v. Farnsworth*, Id., 751; *Abbott v. Fagg*, Id., 742. Trusts, *Peck*, 443; 5 Sneed, 465. Infants, agreements in causes, *Shellby v. Yancey*, 1 Co. Overt, 185, foot; 5 Co. Hay, 504, foot; *Jones v. Kimbro*, 6 Hum., 319.

Statute cited: 1835, ch. 26.

FROM WILSON.

In Chancery at Lebanon, B. L. RIDLEY, Ch., presiding at April Term, 1861; JOHN P. STEELE, Ch., presiding at April Term, 1866, and allowing the bill of review to be filed; HENRY COOPER, J., at October Term, 1866, and December, 1866.

STOKES & SON, for complainants, contended that a bill of review did not lie from a decree entered by consent: 10 Yer., 55, 7; 3 Yer., 378, 9; *Webb v. Webb*, 3 Swanst, 658; nor would an appeal or re-hearing: *Atkinson v. Monks*, 1 Cow., 709; *Kane v. Whitlick*, 8 Wend., 219; *French v. Shotwell*, 5 Johns. Ch., 564; 2 Madd. Ch., 577; *McRae v. David*, 7 Rich. Eq., 376. Decree binds him so that he would be liable if she had died. The affidavit for the bill of review is insufficient, *Colville v. Colville*, 9 Hum., 524; *Frazer v. Syfert*, 5 Sneed, 100, 1. Divorce does not release husband, 2 Scribner on Dower, 508, 9; *McQueen Husb. and Wife*, 211; *Bacon Ab.*,

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Baron & Feme, F.; *Jones v. Walker*, 5 Sneed, 135; *Wait v. Wait*, 4 N. Y., 100, 1, 109; Code, 2471, 2472, 3; *Ames v. Norman*, 4 Sneed, 683; *Forest v. Forest*, 6 Duer, 102; *Burr v. Burr*, 10 Paige, 25, 6; *Mansfield v. McIntyre*, 10 Ohio, 28; *Gillespie v. Worford*, 2 Cold., 632; Bishop, Mar. & Div., § 705. Mr. Bishop's views and cases do not apply, under our statute, Bishop, Mar. & Div., 3 ed., 661, 666. He is clearly liable for what came to his hands, 1 Hill, (S. C.) 410; 3 Monroe, 354; 7 Monroe, 339; 2 J. J. Marshall, 190; 4 Id., 215.

WILLIAMSON & MARTIN, for defendant, insisted that the husband was discharged by divorce, 2 Lomax on Ex'rs, 501, 2; 2 Bright on Husb. and Wife, 22, 33. It is like a marriage dissolved by death, *Chenault v. Chenault*, 5 Sneed, 250. He should only be charged for his own breach of trust, 1 Sto. Eq. Jur., § 582; *Adair v. Shaw*, 1 Sch. & Lef., 273; 2 Bright on Husb. and Wife, 22, 36. In reply to a suggestion that a wife divorced was entitled to dower, they inquired what would be the result if the husband left more than three divorced wives living.

J. J. TURNER, with them, on release of husband by divorce, cited 2 W'ms on Ex'rs, 1562, m; 2 Lomax on Ex'rs, 2 ed., 305, 501 m; 1 Roper, 187; 2 Bright on Husb. and Wife, 22, 25, 27, 30; Reeve Dom. Rel., 1; Clancy on Husb. and Wife, 13, 14, 18; 5 J. J. Marshall, (Ky.) 214; 9 B. Monroe, 412; 13 Ves., 517; 3 B. Monroe, 354; 2 Dana, 238; 28 Law Lib. —; 1 Sch. & Lef., 262, 5; 1 P. W'ms, 466; 3 Id., 409; Cord on Married Women, 880, 1, 2; Bishop on Mar. & Div., 660, 668;

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17 Mo., 87; 10 Paige, 420, 421; 8 Mass., 99; 20 Mo., 363.

NELSON, J., delivered the opinion of the Court.

Complainants, Nathan J. C. and Robert F. Allen, are the children of the defendant, Susan F. McCullough, by her first husband, Robert C. Allen, who died intestate in March, 1842. After his death, she intermarried with William P. Harris; and complainant, Martha Ann, is the only issue of the second marriage. William P. Harris died, intestate, in the year 1849, and the defendant, Susan, intermarried with her co-defendant, James McCullough, in the month of October, 1855. A separation occurred in the month of December, 1860; and McCullough, in the year 1864, filed a bill for divorce, against his wife, in the Circuit Court of Wilson, which was dismissed by said Court on the 23rd of September, 1865; and, at the same time, a decree was pronounced in her favor, on her answer and cross bill, and a divorce was granted, on the ground of the adultery of her husband. During the marriage, and on 19th April, 1860, this bill was filed for the purposes of having the right of complainants declared to the tract of 260 acres of land mentioned in the pleadings; of causing their interest in certain slaves to be ascertained and determined, and of compelling an account as to the guardianship of complainants.

It seems that the defendant, Susan F., was qualified as their guardian, at the January Term, 1852, of the County Court of Wilson County, and continued to act as such until 1860, when the complainant, Nathan, having attained his majority, was duly qualified as guardian of

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complainants, Richard F., and Martha Ann. Complainants, Nathan and Richard F., claim that their father, Robert C. Allen, was the owner of a tract of land of seventy-five acres, which descended to them as his sole heirs at law; that the rents and profits thereof were received by their mother, Susan F., before her inter-marriage with the said James McCullough, and by her and her husband afterwards. They further claim an interest in certain slaves, under a deed of gift from their grand-father, bearing date 8th April, 1842; and all the complainants claim an interest in his estate under the will of their said grand-father, John Jarratt, bearing date 12th September, 1848.

McCullough and wife having filed separate answers, the case was regularly heard in the Chancery Court at Lebanon, and on 11th April, 1861, a decree was regularly pronounced, in which various facts were stated as appearing to the satisfaction of the Chancellor, and by which the Master was directed to take and state an account, and to charge the defendants with two-thirds of the rents and profits of the tract of land known in the pleadings as the Bend tract, and two-thirds of the reasonable hire annually of the slaves, and their increase, conveyed by said deed of gift of 8th April, 1842, beginning with the years that defendant, Susan F., obtained possession of said land and slaves, "and to the first of last year as to the land." Minute directions were given in said decree as to the mode of taking and stating the account, and the parties were authorized to take additional proof, and to examine each other on interrogatories touching the matters of reference, and the Master was directed to make his report to the next term. So much of the complainant's bill as seeks

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to pursue their trust fund into the home tract of land, was dismissed, and the costs were equally divided between complainants and defendant, James McCullough. Complainants prayed an appeal as to so much of the decree as dismissed their bill in regard to the home tract, and taxed them with one-half of the costs, but the Chancellor declined to grant the appeal before the coming in of the Master's report. The settlements made by defendant, Susan F., as guardian, were set aside by said report, and, at the instance of her husband, she was directed to file with the Master all her books of account and vouchers as guardian.

The case appears to have slumbered during the war, and until 10th October, 1865, when the death of Richard F. Allen, one of the complainants, was declared by an interlocutory order; and it appearing that the account had not been taken, said order proceeds as follows: "On motion, with the consent of the solicitors of the parties, it is ordered that the decree of reference heretofore pronounced in the case be revived, and the Clerk and Master be required to take and report to the next term the account therein ordered; and that this cause stand and be revived in the name of such person or persons, as may be qualified as administrator on the estate of said Richard F., from and after the filing of letters of administration in the office of said Clerk and Master; but no steps, in taking the account, shall be taken until the filing of said letters." It is stated, in the record, that F. A. Chandler filed his letters as administrator of Richard F. Allen, deceased, on 6th November, 1865, and the Master proceeded to hear proof and filed his report, 2d April, 1866. Ex-

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ceptions were filed 13th April, 1866, in behalf of McCullough, the seventh and last of which is as follows, viz: "He also excepts upon the ground that James McCullough is not responsible for anything from 1842 to October, 1855, for the reason that he and his wife, Susan, were divorced in 1865, before the account was taken, and he is not responsible for any amount, save where he received assets; and he is not responsible, since 1855, for the devastavits of Susan McCullough, which he did not participate in, now having no assets of his former wife, and having paid out more than he received."

Apparently distrustful as to the propriety of presenting such new and important matter in the form of an exception to the Master's report, the defendant, James McCullough, made application to the Chancellor for leave to file a bill of review, and on 14th April, 1866, an interlocutory decree was made, in which it is stated that the conditions necessary for filing such a bill having been complied with, and the Court being of opinion that it was a proper case for filing such bill, leave was granted, and the complainants waived the issuance of a copy and subpœna, but without waiving any right of defense by plea, answer or otherwise. The complainants also excepted to the action of the Court in granting leave to file said bill. The bill of review was filed, however, on the same day, and among other things it is alleged that the complainants are seeking to hold the said James McCullough liable for the sum of \$8,500, with interest from 1st April, 1866, reported by the Master; that he married the defendant, Susan, in October, 1855, and they lived together until March, 1860, when they parted; that she was divorced from him

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23rd September, 1865, by a decree of the Wilson Circuit Court, a copy of which he exhibits; that it is shown by the report that \$3,137 of the amount reported had passed into said Susan's hands before the marriage, making, with compound interest, about \$6,000 of the amount reported; that the said James ought not to be held to account for any part of the liability which accrued during the marriage, unless he participated therein or received the assets; that he did not then have any of the property of said Susan, except one or two articles of furniture not worth more than thirty dollars, and could not be made liable for the value of her property, or any pecuniary liability incurred by her, to a greater amount than he had actually received; that the divorce was a civil death, and having occurred since the first decree ordering an account, he could not sconer avail himself of it as a defense. Answers were filed to the bill of review by Mrs. Allen, formerly McCullough, and the other parties; and, for the purpose of expediting the cause, it was ordered, 19th October, 1866, that all the matters of account embraced in the cross bill and bill of review, were referred to the Master to hear proof and report, but saving to both parties "all defenses existing before the date of said agreement." This order of reference was set aside by consent, 10th December, 1866, and the Chancellor, after hearing argument of counsel on defendant's motion for specific instructions to the Master touching the matters alleged in "the cross bill or bill of review," directed that the Master should, in taking the account, charge the defendant, McCullough, with all the hire of the slaves and the rent of the Bend tract of land received by himself or defendant, Susan F., during the

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existence of the coverture between them, giving to the complainants the proportions of the hire and rent to which they are entitled under the said decree of April, 1861, and crediting him with all legal disbursements made by him or the said Susan F., during the coverture.

The Master made his report 16th December, 1866, to which exceptions were filed by defendant, James McCullough, which were disallowed on the final hearing 17th December, 1866, and a decree rendered in favor of complainants against Susan F. Harris, for \$8,506.46, with interest from 1st April, 1866, the same being adjudged to complainants in different proportions; and to be credited with whatever amount they might collect from James McCullough, against whom a decree was rendered for the aggregate amount of \$3,464.40, to be paid to complainants in unequal proportions. If not paid before the February Rules, the Master was directed to sell the property attached in the mode specified in said decree. From this decree, an appeal was granted to the complainants, and to the defendant, James McCullough.

Various questions have been presented here in the determination of which we have been greatly aided by the faithful and laborious researches and able arguments of the counsel on both sides.

1. What was the effect, under the circumstances of the case, of the divorce granted after the suit had been pending for several years, and especially after the decree of April, 1861?

It is a familiar principle, that the husband, by marriage, acquires an absolute title to all the personal property of the wife, not being her separate estate created by

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deed, will, or other lawful mode of creating such estate, which she had in possession, or in action, at the time of the marriage, and which he reduces into his possession during the marriage; and after her death, he may, if he survives her, become her administrator, and recover her choses in action, or other personal property not reduced into possession during the coverture: See Reeve's Dom. Rel., 1; Ch. Pl., 31; Browne on Actions, 43 Law. Lib., 237, m.

As a consequence of this principle, the husband becomes liable to the creditors of the wife for all debts due or owing by her at the time of the marriage, and this whether he acquires any property in fact by the marriage or not; but it is generally said that this liability continues no longer than the coverture, and is wholly independent of any question growing out of the amount of property received or not received in virtue of his marital rights: Reeve's Dom. Rel., 3rd ed., 53, 54; *Adair v. Shaw*, 1 Sch. and Lef., 263; *Jones v. Walkup*, 5 Sneed, 138, 139; Browne on Act., 43 Law. Lib., 245, m.

Founding their argument upon the principle last stated, it is strenuously maintained by the counsel of James McCullough, that the divorce obtained by his wife operated as a civil death; that no decree finally and definitely ascertaining the amount of his liability for the acts of the wife before and during the marriage, was pronounced anterior to the divorce; that the effect of the appeal in this case was to vacate and annul all the decrees pronounced in the Chancery Court, and that this Court has no more power to pronounce a decree against the husband, for the wife's liability, than it would have possessed in the event of her natural death. In aid of

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this position, several authorities have been cited; but the doctrine to be deduced from them is, summarily and correctly, stated in Shelford on Mar. and Div., 31 Law Library, 639, m., as follows: "The husband is liable to the debts of the wife contracted by her before the coverture, and the husband and wife may be jointly sued for such debts during coverture. But if these debts are not recovered against the husband and wife in her lifetime, the husband cannot be charged for them, either at law or in equity, after the death of the wife. The husband, during the coverture, is liable for all his wife's debts, though he had nothing with her; and, on the other hand, though he had a considerable personal estate with her, yet, unless he be sued during the coverture, he is not afterwards liable, even in equity. But if the wife survive the husband, an action may be maintained against her for the recovery of such debts."

While such is the general doctrine as to rights which may be affected by the natural death of the wife, but little aid can be derived from the English authorities as to the effect to be given here to a divorce from the bonds of matrimony. There it would seem that the power to grant a divorce *a vinculo* rested only in Parliament, as it was exercised by our State Legislature prior to the Constitution of 1834. The divorce *a vinculo matrimonii* was unknown to the Ecclesiastical Courts, which had only the power to declare the nullity of the marriage for causes existing at the time when the marriage took place; and could not, even for adultery, grant any other than a divorce or separation *a mensa et thoro*. See Shelf. on Mar. and Div., 31 Law Lib., 364, 365, marg. But, by the

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Constitution of 1834, Article XI, section 4, the Legislature was prohibited from granting divorces, but empowered to authorize the courts of justice, by general and uniform laws, to grant them for such causes as might be specified by law. This was followed by the act of 1835, c. 26, and by other statutes passed subsequently, and carried into the Code, 2448, 2478. Without here transcribing section 2448, which specifies nine causes of divorce from the bonds of matrimony, it will be seen that three of them, at least, are causes existing at the date of the marriage, and which would avoid the contract for fraud; while the remaining six causes are such as arise after the marriage is celebrated. From the very nature of the causes, the effect of the decree dissolving the bonds of matrimony might be different in the two classes of cases—declaring, in the one, that the marriage never had a legal existence; and, in the other, that although lawful in its origin, the contract is abrogated for causes subsequently occurring. In the one, it might be properly declared that no rights of property were acquired by either party; in the other, that rights which had been acquired and acted upon would not be disturbed.

When the divorce is granted for causes which arose during the marriage, it does not follow that the same legal consequences would result as in case of the death of either party; for, although the bonds of matrimony are dissolved, and either party is at liberty to marry again, there are rights of property connected with or growing out of the marriage relation, which, under the provisions of the Code, continue after the dissolution of the marriage, and are dependent upon which of the parties may

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be the successful actor in procuring the divorce. Under section 2471, and the four previous sections, if the wife be the successful party, the most liberal provisions may be made by the Court pronouncing the decree, for alimony and the support of the wife, by vesting in her the title to part of the husband's property; but it is expressly declared that "if the wife, at the time of a decree dissolving the marriage, be the owner of any lands, or have in her possession, goods, or chattels, or choses in action, acquired by her own industry, or given to her by devise or otherwise, or which may have come to her, or to which she may be entitled by the decease of any relative intestate, she shall have entire and exclusive dominion and control thereof, and may sue for and recover the same in her own name, subject, however, to the rights of creditors who became such before the decree was pronounced." And, on the other hand, it is provided, by section 2472, that: "When a marriage is dissolved at the suit of the husband, and the defendant is owner, in her own right, of lands, his right to and interest therein, and to the rents and profits of the same, shall not be taken away or impaired by the dissolution, but the same shall remain to him as though the marriage had continued; and he shall also be entitled to her personal estate in possession or in action, and may sue for and recover the same in his own name." Other important provisions are contained in sections 2473 to 2477, relating to the person by whom and the causes for which the divorce may be obtained, and the rights of property, &c.; but the sections quoted clearly show that, by the laws of this State, the consequences of a divorce *a vinculo* are

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not the same as those resulting from the death of either party.

In the event of the wife's death, the husband can only become owner of her personal property and choses in action not reduced into possession during the coverture by administering on her estate; and is then only liable to the wife's creditors before marriage to the extent of the value of the property administered upon, and this without any reference to the quantity or value of the property reduced into his possession during the marriage. But the necessary implication resulting from, and the proper construction of, the language employed in section 2471—*"subject, however, to the rights of creditors who became such before the decree was pronounced"*—is, that the creditors of the husband, or of the husband and wife, who maintained that relation at any time during the marriage, are not to be precluded from collecting their debts out of the husband, or out of the wife's property to which his marital rights had attached, by reason of the divorce *a vinculo*. Nor was it the intention to preclude the creditors of the wife, who were such before the marriage, from collecting their debts out of her property secured to her by section 2471. The character of the property specified justifies the interpretation which includes the creditors of both or either. If, at the time of the divorce, she was the owner of any lands, the husband, notwithstanding the divorce, would be tenant by the courtesy or during the life of the wife, according to circumstances. If she has in her possession goods, or chattels, or choses in action, acquired by her own industry, the husband would be en-

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titled to these by virtue of his marital right; and as credit may have been extended to the wife on the faith of the wife's ownership, before the marriage, or to the husband on the faith of his ownership, afterwards, the intention was to save the rights of the creditors of either, and to hold the property liable to the satisfaction of their demands. And it is implied in this section, that, although a decree dissolving a marriage may be pronounced, the husband's marital right to reduce into his possession any personal property given to or inherited by her, having attached during the marriage, would continue after its dissolution; and therefore, if there are no creditors, his right to do so is restricted and destroyed by the saving in favor of the wife, (creditors out of the way,) to sue for and recover the same in her own name, and to have entire and exclusive dominion and control thereof.

The provision in section 2473, that "if the bonds of matrimony be dissolved at the suit of the husband, the defendant shall not be entitled to dower in the complainant's real estate, nor to any part of his personal estate, in case of his intestacy, nor to alimony," when taken in connection with the provision in section 2398, that "if any person die intestate, leaving a widow, she shall be entitled to dower in one-third part of all the lands of which her husband died seized and possessed, or of which he was equitable owner," clearly conveys the idea that, in the view of the Legislature, a divorced wife might be regarded as a widow, and would be entitled to dower and distribution; and the obvious intention was to punish

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her as the faulty or guilty party, by excluding her from asserting such claims where the marriage is dissolved at the husband's instance.

In the case of *Ames v. Norman*, 4 Sneed, 683, where a conveyance was made in fee, during the marriage, to husband and wife jointly, and the land was sold at the instance of an execution creditor of the husband, and a bill was filed by the wife for divorce, this Court held that the unity of seizin in respect to the joint estate was severed and destroyed by the divorce; that the parties held by moieties; that the purchaser "became invested with the right of the husband as it existed at the time of the sale, that is, a right to occupy and to enjoy the profits of the land as owner during the joint lives of the husband and wife, subject to the contingency that if the complainant survived her former husband, his estate would then terminate; but if the husband survived, he would become absolute owner of the whole estate." In that case, it was observed by McKinney, J., that "the decree in this case would seem to take it for granted that, upon a dissolution of the marriage by a divorce at the suit of the wife, the same legal consequences follow, in all respects, as if the marriage had been dissolved by the death of the husband. This is a very erroneous assumption, so far, at least, as relates to the question under consideration." *Ibid*, 694. And, in the case of *Gillespie v. Worf*, 2 Cold., 632, it was held, that where the husband had conveyed the wife's land in fee, for himself, and as attorney in fact for the wife, although the power of attorney executed by the wife was void and inoperative to convey her interest in the land, yet the deed, notwith-

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standing a subsequent divorce at the wife's instance, was operative to pass the husband's title as tenant by the courtesy, and "vested the purchasers with an estate of freehold in the one-third undivided interest in the lands therein described, determinable on the death of the tenant by the courtesy." *Ibid*, 644.

We hold, therefore, that the same legal consequences did not result from the divorce obtained by the wife in the case before us, that would have resulted from her natural death.

2. In accordance with the opinions delivered in three cases recently determined by this Court at Knoxville,¹ we hold that the decree in this case, pronounced 11th April, 1861, was final in such a sense as that an appeal might then have been granted, by the Chancellor, as a matter of favor, though not as a matter of right. By that decree, the liability of James McCullough, as husband, was definitely fixed and ascertained, and nothing remained to be done except to ascertain its amount by the reference to the Master. Although all further action seems to have been suspended until 10th October, 1865, the decree was then revived by consent, and the Master was required to take and report to the next term the account therein ordered. It appears that the divorce had been granted by a decree pronounced 23d September, 1865, and it can not be doubted that James McCullough had full knowledge of this fact when he consented, through his counsel, to the revivor of the decree of 11th April, 1861. There is no allegation of surprise as to the decree of 10th Oc-

¹ *Meek v. Mathis*, 1 Heis., 534; *Harrison v. Farnsworth*, Id., 751; *Abbott v. Fagg*, Id., 742.

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tober, 1865, in his bill of review, filed 14th April, 1866, in which relief seems to be sought chiefly upon two grounds: first, that he had discharged debts of the wife to a much larger amount than any property or effects of her's received by him during the marriage; and secondly, that "this matter has occurred since the procuring the divorce in this cause, and the ordering of the account, and the same could not have been used by him in his defense against said decree." It does not appear in proof that the defendant had "paid out two thousand dollars more than means or assets came to him from her," and that this matter had occurred after the divorce was procured in the short interval between 23rd September, 1865, and 14th April, 1866, and this allegation in the bill of review is entirely unsupported. If it had been established by evidence, it could not have affected the result, as the liability of the husband for the wife's debts does not depend upon the amount of her property received, but upon the legal results of the marriage relation.

While the death of the wife, pending an action at law against husband and wife, upon the contract of the latter before marriage, would, perhaps, abate the suit as to the husband, it cannot be insisted that if the claim had been ripened into a judgment, her subsequent death would absolve the husband from liability. If, after the husband's death, the wife, being under a moral obligation to pay a debt contracted by her during the marriage, but for which she could not have been sued, promises to pay, the moral obligation is a sufficient consideration to support the promise, and the action can be maintained; and, by a parity of reasoning, if the hus-

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band, after the wife's death, assume, in consideration of the marriage or of property received by her, to pay a debt contracted by her before marriage, an action can be successfully prosecuted upon such promise. Consequently, we hold, in the case under consideration, that, as the liability of McCullough was ascertained by a decree pronounced during the marriage, and as he consented to a renewal of the decree after the divorce, he could not change this liability by filing a bill of review, or by appeal. Having consented to the decree reviving the order to account, he cannot, by his appeal, retract that consent. He is estopped by his own admission of record, made through his counsel, whose authority he does not question in his bill of review; and the only effect of the appeal is to enable this Court to consider the account, and to ascertain and determine whether it was correctly taken, upon the principles ascertained and declared in the order of reference. See *Webb v. Webb*, 3 Swanston, 658; *Atkerson v. Marks*, 1 Cow., 709; *Kane v. Whitlick*, 8 Wend., 219. See, also, Code, 3107, 2979.

3. We do not determine that McCullough, in consequence of his marriage, actually became guardian in place of his wife, who, as is admitted in the pleadings, was appointed guardian at the January Term, 1860, by the County Court of Wilson county. In England, it has been held that where a female marries, who has been appointed guardian by the Court, it is, of course, to make a reference to appoint a guardian, even if she be the mother of the infant; but she may be re-appointed. 3 Lead. Ca. in Eq., 234, 3rd ed. Although the Code, 2489 to 2546, contains the results of very careful legis-

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lation as to the duties and rights of guardian and ward, and, without abridging the powers of the Chancery Court, confers a very extensive and important jurisdiction upon the County Court, as to the appointment and removal of guardians and the settlements to be made with them, it does not contain any provision whatever as to the legal consequences resulting from the marriage of a female guardian. But as the County Court, by Code, 2493, is invested with "full power to take cognizance of all matters concerning minors and their estates," and may appoint a guardian wherever it appears necessary, it may be presumed that if a female guardian marries a person who, in the judgment of the Court, is not a proper person to act in that character, it would be competent for the Court to treat the marriage as a renunciation of the guardianship, and to appoint a new guardian in her place. This point is not now adjudicated, and is noticed, incidentally, for the purpose of declaring, as we do in this case, that if a man marries a woman who is guardian at the time, he assumes, by the marriage, her contract of guardianship, just as, by the marriage, he becomes liable, in any other case, for the contracts of the wife; and if, as was the case here, the wife, with his knowledge, continues to act in her fiduciary capacity, and to make settlements as guardian with the County Court, or continues to act as guardian, and fails to make the annual settlements required by law, he becomes just as much bound for her acts as if his own name were affixed to her bond as guardian. It is a well established principle of equity jurisprudence that "trusts are enforced not only against those persons who are rightfully pos-

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sessed of the trust property as trustees, but also against all persons who come into possession of the property bound by the trust, with notice of the trust; and whosoever so comes into possession is considered as bound, with respect to that special property, to the execution of the trust." See *Adair v. Shaw*, 1 Sch. and Lef., 262; Peck, 443; 5 Sneed, 465.

Neither the death of the wife, nor a divorce, can exonerate the husband from her liability as guardian, both before and during her coverture. It is presumed that she has carried, or ought to carry, the annual accretions of the ward's estate into each successive year; that she holds, or is bound to hold, the accumulated and accumulating funds in her hands at the commencement of each year, and that these are on hand, or subject to her control, if she still acts as guardian, at the time of the marriage, and that if she continues to act after the marriage, it is with her husband's assent, and is, in law, his act; and although he is not technically a guardian, he becomes such, practically and by operation of law, so far as the estate of the ward is concerned, through the legal identity of husband and wife, and is to be regarded in equity as contracting jointly with her for its faithful management and their joint accountability. If he does not wish to maintain this attitude, and the legal control over the wife with which he is invested by law is inadequate to enable him to escape future liability, it would not be difficult for him to obtain relief from the County or Chancery Courts. He is presumed to know his own rights, and to be capable of asserting and maintaining them. The minors are presumed not to know, and to

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be incapable of enforcing their legal interests; and it would be inequitable to permit their estate to be squandered, and to allow the husband, whose criminal misconduct occasioned the divorce, to take advantage of his own wrong, and shelter himself behind the technical defense, that the dissolution of the marriage protects him against acts which were just as much his own as the acts of his wife, in legal contemplation.

4. Holding that McCullough is precluded by "the consent decree," as it has been styled in the arguments, from inquiring into the grounds upon which the Chancellor acted, we hold, likewise, that the complainants, although they were minors at the commencement of the suit, are bound by the consent of their guardian, given through their solicitors. Although it is usual, in cases of compromise, or where decrees are pronounced by consent, to refer it to the Master to inquire whether the decree, where infants are concerned, will be for their benefit, yet, if it clearly appears, as in this case, that the decree is beneficial to the infants, a decree may be pronounced, on the consent of the guardian and all other parties. See *Macph. on Inf.*, 39 *Law Lib.*, 409, 544, *marg. pp.*; and as to admissions in pleading, and agreements generally in the progress of causes, see *Shelby v. Yancey*, 1 *Coop. Overt.* 185, *foot p*; 3 *Coop. Hay.*, 504, *foot p*; *Jones v. Kimbro*, 6 *Hum.*, 319.

In this view, it is unnecessary to give any construction to the deed of gift from John Jarrett, bearing date the 8th of April, 1842, or to his will, bearing date 12th of September, 1848, as these instruments were construed, and the rights of the parties under them declared by

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the decree of the 11th of April, 1861, and the revivor of said decree by consent on the 10th day of October, 1865. The consent mentioned in the last named decree, that "the decree of reference heretofore pronounced in this case be revived," evidently applies to the entire decree of the 11th of April, 1861, and embraces not only the proofs to be heard, and the matters of calculation to be made by the Master, but the principles upon which the account was ordered; for if the rights declared are not embraced in the expression, "the decree of reference," it would be difficult, if not almost impossible, to comprehend the points referred, or the instructions under which the Master was directed to act.

With the modifications of the account directed in the memorandum appended hereto, the decrees of the Chancellor are, in all other respects, affirmed. Let it be referred to the Clerk of this Court, to re-state the account, with the modifications above indicated. And because it appears that the defendant, James McCullough, has prosecuted this appeal as a pauper, let the entire costs of this cause, in this Court and the Court below, be adjudged against the complainants, and the fund decreed in their favor be liable therefor, in addition to their personal liability.

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STEPHEN C. COPE, next friend, v. WM. RAMSEY *et als.*

1. JUDICIAL ACTS. *Liability for. County Court.* Acts done by the defendants as members of a County Court, in a judicial capacity, and without fraud or malice, do not subject them to liability.
2. SAME. *Same.* An order of the County Court to an administrator to pay over Confederate funds collected, to the Clerk of the Court, and exonerating the Clerk from interest, unless he could loan the money, and from loss by depreciation, does not, in the absence of fraud, subject the Justices present to personal liability.

Case cited: *Hoggatt v. Bigley*, 6 Hum., 239.

FROM WARREN.

In the Chancery Court at McMinnville, BARCLAY M. TILLMAN, Ch.

T. B. MURRAY, for complainant, cited *Hoggatt v. Bigley*, 6 Hum., 236.

J. H. SAVAGE, for defendants.

SNEED, J., delivered the opinion of the Court.

The bill is filed by Stephen C. Cope as the friend of Washington Perkins, a minor, to hold the defendants, as Justices of the county of Warren, and members of the Quorum Court of that county, personally liable for the sum of three hundred and eleven dollars and interest, paid into the hands of the Clerk of said Court, in Confederate money, by Thomas Webb, administrator of the estate of John P. Perkins, deceased, father of the said Washington.

The bill is filed for other purposes, also, and against divers other defendants; but it was demurred to by the de-

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fendants Ramsey and Green, and the question before us is, whether or not the Court below erred in allowing the demurrer and dismissing the bill as to the two said defendants. At the November Term, 1862, of said Court, the Clerk presented his report of the settlement with the said Thomas Webb, administrator, and Mary E. Perkins, administratrix, of the estate of the said John P. Perkins, deceased, of their administration, which was in all things confirmed. From the decree of confirmation we extract the concluding paragraph, in the words following: "And it further appeared to the Court that said administrators had made a final settlement and had collected all that was due said estate, in Confederate funds, and said administrators asked permission to pay over said funds in their hands to the Clerk of the County Court; it is therefore ordered by the Court that said administrators pay over said funds to the Clerk as aforesaid, and take his receipt for the same. It is further ordered by the Court that the clerk is not liable for any interest on said funds, except he can loan the same; and it is further ordered, that in the event said Confederate funds should become depreciated, it is ordered by the Court that said clerk is not in any way liable for the same."

The defendants, William Ramsey and Elias Green, were of the Quorum Court, and were presiding at the time of the rendition of said decree. The bill charges that all the parties defendant combined and confederated together to cheat and defraud said minor in this and the various other transactions complained of. There is no proof that tends to throw suspicion on these two defendants. They answer and repel the charges against them, and assert

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that they had no other motive in making said order than to do what seemed, upon their best judgment, to be their duty as a Court.

A demurrer is incorporated in the answer, assigning as causes of demurrer:

"1. That it appears from the charges made against the defendants, that the acts complained of, and for which it is attempted to hold them responsible, were done by respondent in a judicial capacity as the Quorum Court of the county of Warren.

"2. It is nowhere charged in said bill that respondents, in their judicial capacity, acted fraudulently or maliciously towards Washington Perkins; nor is there any charge, matter or thing stated in said bill upon which to ground a prayer for relief against them.

"3. The bill shows that James Cope is the regular guardian of Washington Perkins. It may be stated that the bill charges some of the other parties defendant with certain alleged fraudulent transactions, with specifications thereof, and concludes with the general sweeping charge that all the defendants combined and confederated together to cheat and defraud the said Washington; but it does not connect these defendants with said transactions, and only complains of them in regard to their action as a Court, which the bill does not charge to have been corrupt, malicious, or for any fraudulent or dishonest purpose."

It is a familiar principle of the common law, that, while acting within the sphere of his jurisdiction, a judge is not to be held responsible for any errors of judgment or mistake he may commit as judge. Coke Litt., 294; 5 Johns, 282. The statement of the prin-

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ciple in the ancient authorities, that the judge is thus exculpated while "acting within the bounds of his jurisdiction," would seem to import his personal accountability for an error committed upon an honest mistake of jurisdiction. This can not be the intention of the law. Judge Green states the principle more guardedly, that a judicial officer is not responsible for mere errors of judgment in a case of which he has jurisdiction, and in which, without malice, he honestly pronounces what he believes to be the judgment of the law. *Hoggatt v. Bigley*, 6 Hum., 239. We can conceive of many cases; and indeed they are of frequent occurrence, where a judicial officer pronounces an erroneous judgment from an honest sense of right, but upon a mistaken opinion of his jurisdiction of the person or the subject matter. The law has provided the most ample remedies both for the prevention and correction of such errors. And we apprehend the true sense of the doctrine to be, that a judicial officer is personally responsible to the injured party only for the errors committed in the arbitrary, corrupt and malicious exercise of an assumed judicial authority, without regard to the question of his jurisdiction.

It is a general principle that an error or irregularity in a judicial proceeding can not be attacked collaterally in any other suit than that in which the irregularity occurs, or on appeal or process in error therefrom. Cooley's Con. Lim., 409. The exception to this rule embraces the vast number of cases in which the jurisdiction is conferred upon a court of equity to correct and annul the judgments of a court of law upon grounds peculiarly cognizable in a court of equity. Among them is

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the corrupt, fraudulent and malicious exercise of judicial power, whether the corrupt motives are patent at the moment of such judicial action or come to light afterwards. If it be a simple error of an honest judgment, then the remedy is in a court for the correction of errors; but if it be an error fraudulent, corrupt, malicious and injurious, then the proper forum is the court of equity, with its ample remedial powers, not only to check the wrong, but to vindicate and secure the right.

The defendants were of the Justices of the County of Warren, who constitute a judicial tribunal known to our law as the Quorum County Court, in which was vested by law the original and exclusive jurisdiction of matters of administration and the settlement of the accounts thereof. If, in the rendition of the order complained of, they have done the complainants wrong by an honest error of judgment, they are not responsible for it, pecuniarily or otherwise. But if they have acted corruptly, maliciously and with purpose to defraud the complainant of his rights, then, in an appropriate proceeding, they are responsible. The bill does not make out such a case. It does not impute to these Justices any corrupt or dishonest motive touching this judicial act, and it is therefore demurrable.

The decree of the Chancellor is affirmed, and the bill as to these defendants will be dismissed.

Thornton Flint v. J. D. Tillman, Adm'r.

THORNTON FLINT v. J. D. TILLMAN, Adm'r.

1. SET OFF. *Partnership and individual debts not mutual.* A debt due from a partnership can not be set off at law against a debt due to a plaintiff, who is a member of the partnership.

Code construed: 2787, *et seq.*, 2918.

Statute cited: 1756 c. 4, § 7.

Cases cited: *Blanks v. Smith*, Peck, 186; *Robertson v. Talbot*, 2 Yer., 258.

FROM LINCOLN.

In the Circuit Court at Fayetteville, N. A. PATTERSON, J., presiding.

JOHN M. BRIGHT, for plaintiff in error, cited Peck, 186; 2 Yer., 258, and *Turbeville v. Broach*, 4 King's Dig., § 10,712; 5 Cold., 270, and commented on them. Also, Code, 2921; *Hickerson v. McFadden*, 1 Swan, 258; *Allen v. McNew*, 8 Hum., 46.

W. F. KERCHEVAL and J. B. LAMB, for defendant, cited the first three cases cited above, and 2 Swan, 647.

SNEED, J., delivered the opinion of the Court.

The plaintiff brought his action of debt upon a bill single for five hundred dollars, executed by defendant, and payable to Henry Kelso, the plaintiff's intestate. The defendant proved that Henry Kelso, the payee of the note, was a member of the firm of Kelso & McDonald, and under the plea of a set-off, offered in evidence a note of said firm, due and payable to himself, for the sum of three hundred and forty-one dollars. The production of the

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note as evidence under the plea, was objected to by the plaintiff, and the objection was by the Court sustained. The verdict and judgment were for the plaintiff, and the defendant has appealed in error.

The question of law submitted, is, whether the defendant, under our statutes, can be allowed to set off a partnership liability against his individual debt.

There is much force in the argument of the defendant's counsel, that the term "mutual demands," as used in our statute, means the right of the defendant to sue and recover by cross action of the plaintiff as a principal his demand against him. And especially is this so in view of our statute by which all joint obligations and promises are made joint and several; and persons jointly or severally, or jointly and severally, bound on the same instrument, may all, or any part of them, be sued in the same action. Code, 2787, *et seq.*

But a set off is not a cross action, but a mere substitute for it, and a thing unknown to the common law. According to the common law, mutual debts are distinct and unextinguishable, except by actual payment or release: 1 Rawle, 293. If the plaintiff, it is said, was indebted to the defendant in as much or even more than the defendant owed to him, yet the defendant had not any method of setting off such debt in the action brought by the plaintiff for the recovery of his debt: Selwyn, N. P., 573. The English statute of 2 Geo. II, c. 22, s. 13, was the first statute of set-off of which we have any account, and it was enacted, it is said, to prevent circuitry of action or a bill in equity. By that statute it was pro-

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vided that, "when there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other."

By the statute of 8 Geo. II, c. 24, s. 4, the provision of the first statute was made perpetual; but as doubts arose as to whether debts of a different nature could be set-off, it was provided further by the latter act that "mutual debts may be set against each other, notwithstanding that such debts are deemed in law to be of a different nature, unless in cases where either of said debts shall accrue by reason of a penalty contained in any bond or specialty." These provisions were incorporated into the statute of North Carolina, of 1756, c. 4, s. 7, and they are the same that have come down to us and are embodied substantially in our Code. It was long ago held in England that a joint demand can not be set-off against a separate one: 6 Bac. Ab., 136. And it was decided at a very early day in this State, that a joint demand can not be set off against a separate one because not a mutual demand within the Act of 1756, c. 4, s. 7. And again a few years later, that a debt due to one of several parties can not be set-off against a demand due from them jointly. *Blanks v. Smith*, Peck R., 186; *Robertson & Curry v. Talbot & Henly*, 2 Yer., 258. And the precise point in this case was before the Supreme Court of Maryland, where it was held that a debt due to the defendant by a partnership of which the plaintiff is a member, can not be set-off against the separate claim of the plaintiff: *Wilson v.*

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Keedy, 8 Gill, 197. And so it is held in Pennsylvania, that, in a suit against one member of a firm, it is not permitted to set-off a debt due the firm from the plaintiff. 2 Barr, 262.

There is an exception recognized in the authorities in favor of a surviving partner, or where one member of the firm becomes the owner or has the exclusive right to settle and control the partnership effects. He may set off a debt of the partnership against a demand on him in his own right, for the reason that having the adjustment of the partnership business, he may release or compound the debts due the firm, or control them upon his discretion and responsibility. 5 Term Rep., 493; 6 Term Rep., 582; 7 Watts, 465. The doctrine that excludes the right of set-off in the cases cited is founded on the idea that the mutuality contemplated by the statute of Geo. II. is wanting. And it rests upon sound reason when applied to partnership debts in view of the relation of each partner to the general creditors and the liens and liabilities which the law imposes upon the partnership effects. The mutuality of the law, then, is the reciprocal obligation of the parties to each other, while the relation of creditor and debtor is mutual between them, each claiming in his own right against the other, whether the mutual debt be of a firm against a firm, or individual against another; or whether it be "between the testator or intestate of both or either party." That mutuality does not exist in this case; and although the defendant may have his action at law against either or both members of the firm or their representatives,

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for the recovery of his debt, yet, for the want of this mutuality, he is deprived of this most convenient statutory remedy of set-off.

Let the judgment be affirmed.

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1. EVIDENCE. *Handwriting. Comparison. Writings not in the cause.* Other writings than the one sued on cannot be introduced in evidence for the purpose of comparison of handwriting by the jury, or by the witnesses.
2. ERROR. *When a ground of reversal.* Where there is error in the admission of evidence, or in the charge, it is not enough to avoid a reversal that there is sufficient evidence to support the verdict, aside from that which is objected to. It must appear that no injury could have been caused by the error.¹

Cases cited: *Fogg v. Dennis*, 3 Hum., 48; *Myers v. Bank of Tennessee*, 3 Head, 331; *Applewhite v. Allen*, 8 Hum., 700; 5 Yer., 379; 3 Sneed, 437; 3 Hay, —; 2 Hum., 78; 1 Head, 549.

FROM LINCOLN.

In the Circuit Court, N. A. PATTERSON, J.

W. F. KERCHEVAL, for plaintiff.

¹ NOTE.—See *Sellars v. Sellars*, post, —. See, also, 2 Head, 135; citing 2 Hum., 106; 4 Hum., 354, 449; and 1 Sneed, 28; 10 Hum., 237; 2 Swan, 307, 383, where there was held to be error. And see *Royston v. Wear*, 3 Head, 11; *Ezell v. The Justices of Giles*, 3 Head, 585; *Martin v. Nance*, 3 Head, 651; *Nailing v. Nailing*, 2 Sneed, 636; *Logue v. Stanton*, 5 Sneed, 97; *Brown v. Phelon*, 2 Swan, 630; *Brown v. Moore*, 3 Head, 673; *Belcher v. State*, 8 Hum., 65; *Wyatt v. State*, 2 Swan, 397; *Dossett v. Miller*, 3 Sneed, 75.

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JOHN M. BRIGHT, for defendant, cited 3 Head, 331, and cases there cited, and 8 Hum., 700.

DEADERICK, J., delivered the opinion of the Court.

The plaintiff brought his action in the Circuit Court of Lincoln county, upon three bonds or bills single, executed, respectively, the 12th of April, 1852; 1st of January, 1855, and 4th of January, 1856, for the aggregate sum of \$736. The defendant pleaded *non est factum*, and on this plea the case was decided against the plaintiff; and he appealed in error to this Court.

On the trial, the defendant offered in evidence certain notes, other than those sued on, purporting to have been executed by his intestate, for the purpose of allowing the witnesses to examine and compare the signatures to them, with those of the notes sued on. This was objected to by the plaintiff, but the objection was overruled by the Court, and several of the witnesses were allowed to state that the notes not sued on in this action were in the handwriting of Bonner, the defendant's intestate. These notes were allowed by the Court to go to the jury, for their inspection and comparison with the notes sued on. This was error.

While the American decisions are not uniform with respect to the admission of papers irrelevant to the record, for the sole purpose of creating a standard of comparison of handwriting, yet the weight of authority is against such practice. Especially is this so in cases where the genuineness of the standard sought to be introduced, may become the subject of controversy.

His Honor, the Circuit Judge, left it to the jury to

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determine, from the proof in regard thereto, whether the signatures introduced for the purpose of comparison were genuine, with instructions that they might compare them with the signatures of the notes sued on, if they were satisfied they were genuine. This, also, is error. This Court, in the case of *Fogg v. Dennis*, 3 Hum., 48, held that it was not competent to submit other writings to a witness, who had testified to a signature, to test his knowledge whether such other writings were genuine or spurious.

It is insisted by defendant, that if the charge of the Court was erroneous on the subject of comparison of handwriting, and the evidence in relation thereto was improperly admitted, that such error did not injure the plaintiff, and the verdict could be sustained without the objectionable evidence; therefore this Court would not reverse for such error. The cases of *Myers v. Bank of Tennessee*, 3 Head, 331, and *Applewhite v. Allen*, 8 Hum., 700, are cited and relied upon to sustain this proposition. We cannot sanction the proposition contended for, nor do we think the cases cited sustain it.

The authorities cited, and others that we have examined, go to the extent only of deciding that this Court will not reverse for an error which they can see from the whole record has not operated to prejudice the party appealing; or, where illegal testimony has been first introduced by him, and subsequently repeated by the other party. 5 Yer., 379; 3 Sneed, 437; 1 Head, 549.

But where illegal testimony has been admitted by the Court, after objection by the party against whom it

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is offered, which might have influenced the verdict of the jury, a new trial ought to be granted to the party who may have been injuriously affected by it. 2 Hum., 78; Gra. & Wat. on New Trials, 608, 609, 612, 613; 3 Hay.

We can not know how much influence the objectionable evidence may have had upon the minds of the jury. But we can see that it might have had influence in producing their verdict, and the parties are entitled to a trial of the issues in their cause by an impartial jury, and to have those issues determined upon legal evidence and upon a proper charge.

We reverse the judgment of the Court below, and remand the cause for a new trial.

N. WELCH, Adm'r, *et al.* v. S. GREENALGE *et al.*

1. DEED OF TRUST. *Tender of the debt. Sale after. Rents.* A tender of the debt, secured by a deed of trust, takes away the power of a trustee to sell. A sale made afterward is wrongful, and a purchaser at such a sale is chargeable with rents to the maker of the deed or his heirs.
2. SAME. *What is good tender.* The maker of a deed of trust having died, leaving minor heirs, his father as next friend of the heirs tendered the money due to the creditor. Held, a good tender to prevent a sale.

FROM WARREN.

In the Chancery Court at McMinnville, before B. M. TILLMAN, Ch.

N. Welch, Adm'r, *et al.* v. S. Greenalge *et al.*

THOMAS B. MURRAY, for complainant.

L. B. WATERS, for respondent.

DEADERICK, J., delivered the opinion of the Court.

W. L. Welch, the intestate of the complainant, N. Welch, was indebted to defendant, Greenalge, who obtained judgment against him for \$175, before a Justice of the Peace, for balance of a house and lot purchased of him.

Waters stayed the judgment for Welch, and took a deed of trust from Welch for his indemnity, which stipulated that if the judgment was not paid by Welch by the 20th of May, 1859, then the trustee was to sell the said house and lot to pay it; and Welch waived his right to redeem.

Before the 20th of May, Welch died, and the complainant, N. Welch, his father, administered upon his estate. Before any sale of the house and lot, Welch, the administrator, tendered to defendant, Greenalge, the amount of his debt; but he refused to receive it upon the ground, as alleged, that he did not know to whom to convey, W. L. Welch being dead, leaving a wife and children. The tender was also made to Waters and the trustee. They, also, refused to receive the money. After the time elapsed, stipulated for in the deed of trust, the house and lot were sold by the trustee, and purchased by defendant, Martin, who has been in possession of the same since his purchase, and claiming under it.

The bill was filed to enforce the right of the heirs

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at law of W. L. Welch to the house and lot, to compel defendants to accept the amount of the debt or judgment, and to be restored to the possession of the property.

The Chancellor decreed in favor of complainants, and vested the title in them upon payment of the purchase money; but refused to allow them any rents for the time the defendant, Martin, was in possession of the property under his purchase; and the complainants, who are the administrator, widow and heirs at law of W. L. Welch, deceased, appeal from the Chancellor's decree to this Court.

The question now presented arises upon that part of the Chancellor's decree which refused to allow rents to complainants of the property purchased and taken possession of by defendant, Martin. In this particular, we think the decree of the Chancellor is erroneous.

Under our statutes upon the subject of redemption, property sold under a deed of trust or mortgage, without judicial sentence, is subject to redemption, unless that right is expressly waived. Code, 2124-25.

If the right is waived and the property is sold, the debtor can not redeem. But before the sale, he is entitled, upon payment or tender of payment to the creditor, to have a re-conveyance of the property, and the trustee has no longer any authority to sell under the trust deed.

By the tender of payment of the debt, secured by the trust deed, and the wrongful refusal of the creditor to receive it, the debtor's right to redeem was preserved; the waiver of the right in the deed of trust having ref-

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erence only to a redemption after a sale lawfully made.

If the redemption was under section 2135 of the Code, the complainants would be entitled to have a credit, for a fair rent of the premises during the time they were in the purchaser's possession.

The sale of the property was wrongful, and the possession taken under said sale was wrongful; and independently of the statutory provision, a party in the wrongful possession of premises will be held to account for the reasonable rents of such property.

So that, in either aspect, the party in possession should be held to account for rents.

The decree of the Chancellor will be reversed in this respect, and the cause remanded for the purpose of ascertaining the amount of rents due, and from whom; and the complainants will be entitled to have the sum ascertained to be due credited on the judgment against W. L. Welch; and the defendants, Martin and Greenalge, will pay the costs of the cause in this Court and in the court below.

In all other respects, the decree of the Chancellor will be affirmed.

And afterwards, (March 4, 1871,) the respondent having filed a petition for a rehearing, in which it was set forth as error materially affecting the decree entered upon the foregoing opinion, that the Court had assumed that N. Welch made the tender of the debt mentioned as administrator, when in point of fact, he had not taken letters of administration until many months afterward; but the Court being of opinion that the position of the

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said N. Welch, as administrator, is not essential to the effect of said tender, but that the same, if made as next friend of the heirs of W. L. Welch, would be equally effectual to protect their interest, denied the said petition, and refused to rehear the same.

GEORGE HENRY, in error, v. BENJAMIN L. BROWN.

EVIDENCE. *Of Character.* In a civil action involving moral turpitude, where the evidence is circumstantial, the defendant may introduce evidence of his good character.

Case cited: *Scott v. Fletcher*, 1 Tenn., 488.

FROM PUTNAM.

In the Circuit Court, J. W. PHILLIPS, J., presiding.

DILLARD & SWOPE, for plaintiff in error.

HOLLAND DENTON, for defendant.

FREEMAN, J., delivered the opinion of the Court.

This is an action commenced by summons before a Justice of the Peace of Putnam County. The cause of action is stated to be "a plea of trespass on the case, with force and arms, for killing his heifer, and converting her to his own use," to his damage, etc.

The case was tried on appeal to the Circuit Court, and verdict had for plaintiff below; a motion for new trial made and overruled, and appeal in nature of writ of error to this Court.

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The main question presented in argument before us, arises on the proposition by defendant below, to prove, "by all the plaintiff's witnesses, that they knew the defendant's general character well, and lived close to him; and that his general character for honesty was as good as that of any man." Which testimony was objected to by plaintiff, and the objection sustained by the Court, to which the defendant excepted.

Did the Court err in this ruling, is the question for our decision.

The facts of the case show an attempt on part of the plaintiff below to fix a liability on defendant because of his assent to, and participation in, the killing of his heifer for beef, using the meat as food for his family, and selling the hide for profit, or sending it to a tan yard as his own. The charge as made out in the proof, or attempted to be made out, is one involving moral turpitude, and an utter want of honesty, such as well may fix a stain on the character of any man. The case is sought to be made out against the defendant below by circumstantial testimony. We hold that, in such a case, evidence of character for honesty and integrity, such as was proposed, was admissible.

In the case of *Brien v. Perry*, 3 Caine's Cases, 120, Judge Tompkins lays down the rule to be "that in actions of tort, and especially charging the defendant with gross depravity and fraud, upon circumstances merely, evidence of uniform integrity and good character, is oftentimes the only testimony which a defendant can oppose to suspicious circumstances."

Chancellor Walworth, in the case of *Townsend v.*

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Graves, gave the above case his sanction, and holds the general rule to be, "that where a party is charged with a crime, or any other act involving moral turpitude, which is endeavored to be fastened on him by circumstantial evidence, or by testimony of witnesses of doubtful credit, he may introduce proof of his former good character for honesty and integrity, to rebut the presumption arising from such evidence, which it may be impossible for him to contradict or explain." See *Scott v. Fletcher*, 1 Tenn. Rep., 488, Cooper's ed.

The rule thus laid down by the learned Chancellor meets our approval, and we think is well sustained by the soundest reasons, based in the philosophy of human action and the well established course of human conduct.

It may be sustained by a liberal application of the principle which allows collateral facts to be given in evidence when they afford any reasonable presumption or inference as to the principal, fact or matter in dispute. Greenl. on Ev., § 59.

* * * * *

The case will be reversed, and remanded to the Circuit Court.

E. W. Bass v. Helen Shurer.

E. W. BASS, in error, v. HELEN SHURER.

1. A plea of payment admits the debt, and the *onus* of proof is on the defendant. In the absence of any proof, the plaintiff not reading his notes the judgment must be for the amount of the notes, as stated in the declaration.
2. A plea that a note was given for Confederate money admits the note, in like manner.
3. COSTS. A Clerk will be deprived of the costs of transcript, unless it is properly made out.

Case cited and distinguished: *McKeel v. Bass*, 5 Cold., 151.

FROM DEKALB.

In the Circuit Court, before A. McCLAIN, J.

The bill of exceptions, which purported to contain all the evidence, did not show that the notes were read.

A. A. HARRIS, for plaintiff in error, cited 5 Cold., 151.

M. M. BRIEN, SR., for defendant in error, cited 2 Meigs' Dig., § 1451.

FREEMAN, J., delivered the opinion of the Court.

The judgment in this case must be affirmed. The suit is on three promissory notes, of which profert is made in the declaration. The pleas are: First, payment, to whole declaration; second, a plea as to one of the notes of \$300, that it was given for Confederate money.

It is insisted that the notes are not in the record, and that there is no evidence to support the verdict; and

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the case of *McKeel v. Bass*, 5 Cold., 151, is referred to. That was a very different case from this: was a suit before a Justice of the Peace, with no written pleadings, and was properly decided. In this case, however, the defendant, by his pleas, has admitted the truth of the declaration, as to making the notes, by his plea of payment, and also by the plea to the \$300 note; in other words, has admitted the liability as charged, unless he shows that he has paid the debt.

Judgment affirmed. The Clerk of the Circuit Court will not be allowed any costs for making out the transcript in this case, on account of irregular arrangement and general confusion.

S. P. GREEN v. P. S. NEAL, Adm'r, &c.

1. FORMER SUIT PENDING. *General bill, bar to a particular bill.* A bill filed by the distributees of an estate against the administrator, to charge him with a *devastavit*, is a good bar to a bill afterwards brought by a creditor for the same *devastavit*.
2. SAME. *Equity pleading. Practice on plea.* Upon a plea in equity of another action pending in equity, it is proper practice to refer the plea to the Clerk, to report whether the suits are for the same cause of action.
3. SAME. A plea of another action pending need not be sworn to.

FROM WARREN.

In the Chancery Court at McMinnville, B. M. TILLMAN, Ch.

W. E. B. JONES, for complainant.

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J. H. SAVAGE, for defendant, cited 1 Abbott's N. Y. Dig., 186.

NICHOLSON, C. J., delivered the opinion of the Court.

Complainant alleges that he is the owner of four small judgments against defendant, as administrator of Jabin Cantrell, deceased, amounting in all to \$51, on which executions have issued and been returned *nulla bona*. He also alleges that defendant has been guilty of wasting and appropriating the assets of the estate, specifying various instances of *derastavit*, and praying that the administrator be decreed to be individually responsible for the satisfaction of complainant's judgments.

Defendant pleads the pendency of a former suit by the distributees of his intestate, in which the same allegations of *devastavit* are made against him as in the present bill; that the two suits are prosecuted for substantially the same causes; and that an account of his administration has been ordered in the first suit, and that the same is still pending; all which he pleads as an answer and bar to complainant's bill.

To this plea is appended an affidavit of defendant, with a certificate of the Deputy of the Clerk and Master, that the same was "sworn and subscribed to" by defendants.

The Chancellor referred the plea to the Clerk and Master for a report, as to whether the two suits were for the same causes of complaint, who reported that the two cases were substantially for the same *devastavits*, making the proceedings in the former suit a part of his report. Exceptions were filed by complainant to the

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report, which were overruled by the Chancellor, the report confirmed, and the bill dismissed; from which decree of dismissal complainant appeals to this Court.

Two objections are relied on here for the reversal of the action of the Chancellor.

First, That the plea is not sufficiently verified as a plea in abatement. But a plea of former suit is not treated in the works on equity pleading as strictly a plea in abatement, but in the nature of a plea in bar; therefore, it need not be sworn to: 1 Dan'l Ch. Pl. and Pr., 662; Bea. on Pl., 160; Story Eq. Pl., § 735 to 743.

The other objection is, that the complainants in the first suit are the distributees seeking to make the administrator personally liable for their distributive shares, on the ground of waste of the assets; whereas, in the second suit the complainant is a creditor, seeking to make the administrator personally liable for his debt, on the ground that he wasted the assets. The only difference in the two suits is, that in the one case the distributees of the intestate sue, and in the other a creditor sues. They make the same allegations of waste, and seek to secure the same object, and through the same channel.

It is clear, if the complainants in the first bill obtain a decree, the amount found in the hands of the administrator will not be decreed to complainants until the debts of the intestate shall be first satisfied. This suit, therefore, is not simply to recover their distributive shares; but to ascertain the amount of the *devastavit*, first for the benefit of creditors, and then for the satisfaction of their distributive shares out of the residue. The re-

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sult is, that the second suit was wholly unnecessary, and only calculated to accumulate costs. The creditor had nothing to do but to await the result of the first suit, and then file his claim for satisfaction; or, if he saw proper, to have made himself a party to the first suit by petition, or even by motion. 1 Dan'l. Ch. Pl. and Pr., 659.

The decree of the Chancellor is affirmed, with costs.

MADISON RICHARDSON v. ASEL DUNCAN.

An ass is within the meaning of the law exempting from execution a horse, mule, or yoke of oxen, in the hands of a person engaged in agriculture.¹

FROM JACKSON.

In the Circuit Court, A. McCLAIN, J., presiding.

JAMES T. QUARLES, for plaintiff.

COX & DEWITT, for defendant.

NICHOLSON, C. J., delivered the opinion of the Court.

Madison Richardson was engaged in agricultural pursuits in Jackson county, and was the head of a family. The only work beast he owned was a jackass, worth twenty dollars. He used this animal in his farming operations. Asel Duncan, a Constable, levied an execution

¹ See *Webb v. Brandon*, Jackson, April 15, 1871.

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on the jackass. Whereupon Richardson brought his action of replevin before a Justice of the Peace, alleging that the defendant had seized and had in his possession, a certain Spanish horse, usually denominated a jack, of a black or dark color, of the value of twenty dollars; and claiming that his Spanish horse, or jack, was unlawfully taken from him, the same being the only horse, mule or ox, that he owned. The Justice of the Peace decided against the plaintiff, on the ground that the law exempts from execution "a horse, mule or yoke of oxen," and that as a jack was neither horse, mule or ox, he was not exempt from levy and sale. Upon appeal to the Circuit Court, the Circuit Judge charged the law as it was held by the Justice of the Peace; whereupon there was a verdict and judgment against the plaintiff, who appealed to this Court, under the pauper law.

We can not concur with the Justice of the Peace and the Circuit Judge, in their construction of the exemption law, as applicable to "a horse, mule, or yoke of oxen." It is clear that this case comes directly within the reason and spirit of the law. The plaintiff was the head of a family, probably a large one. He was engaged in tilling the soil, and his little jackass, worth only twenty dollars, was the sole dependence of his family for ploughing the earth, and making bread for his wife and children.

It is obvious that he is exactly the kind of citizen that the Legislature had in view when they declared that the wives and children of such honest hard-working tillers of the ground should not be reduced to starvation by allowing the creditor to seize the last horse, mule or ox.

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The generous object of the Legislature would be defeated if we should "stick in the bark," and declare that they intended by their legislation to exclude from its benefits all those heads of families who, either from choice or necessity, plowed jackasses instead of horses, mules or oxen. We are satisfied they intended to make no such invidious distinctions, either between citizens equally deserving, or work beasts equally useful. Nor are we required to do any great violence to the letter of the statute in holding that the case before us falls within the reason and object of the enactment. It was held by this Court, many years ago, that a person guilty of mule racing along a public road was indictable under the statute against horse racing. The decision rests upon the solid ground that the two offenses fell alike within the reason of the law. If, in a criminal case, it is allowable to hold that a mule is a horse, if he is used in racing along a big road, much more is it allowable to hold that a jackass, used for farming purposes, is either a horse, or mule, or ox. But we are not without high philological authority for construing the word "horse," used in the statute, as including the "ass." Mr. Webster, in his unabridged and illustrated dictionary, defines an ass to be "a quadruped of the genus *equus*—that is, *equus asinus*—having a peculiarly harsh bray, long stretching ears, and being usually of an ash color with a black bar across his shoulders. The tame or domestic ass is patient to stupidity, and slow." Then the ass is a species of the genus *equus*, or horse. His value for agricultural purposes was one of the lucky developments of the late war. Some who resorted to the services of this species of horse, for such purpose,

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from dire necessity, continue so to use him, either from choice or continued necessity. We think those heads of families, engaged in agriculture, who use the ass or the jackass for such purposes, and not otherwise, are within both the letter and the spirit of the exemption law.

We reverse the judgment, and remand the cause for a new trial.

SMART & EVANS v. MASON.

1. JUDGMENT LIEN. *Not extended in time by the war.* The lien of a judgment obtained in February, 1861, was not extended beyond the time fixed by law, by reason of the war, or by the fact that process could not be issued or executed; but the same expired in February, 1862; and a sale by the judgment debtor, after that time, would pass the title free from the creditor's claim.
2. JUDICIAL NOTICE. This Court will take judicial notice of the existence of the war, but not of the fact that the courts were closed in a particular county at a given time.

Case cited: *Branner v. Nance*, 3 Cold., 299.

FROM WARREN.

In Chancery at McMinnville, before BARCLAY M. TILLMAN, Ch.

T. B. MURRAY, for complainants, cited Meigs' Dig., p. 627, § 1163; Stat. Geo. II, ch. 759; Act of 1777, c. —, s. —; Act of 1799, c. 14, s. 2; *Overton v. Perkins*, M. & Y., 367; *Simmons v. Wood*, 6 Yer., 518, 521.

J. H. SAVAGE, for defendant, cited 3 Cold., 299.

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NICHOLSON, C. J., delivered the opinion of the Court.

In February, 1861, Lucy Forrest recovered a judgment in the Circuit Court of Warren county, against W. A. Garritson as principal, and Smart & Evans as securities, for about \$1,200. No execution issued until 1866, when the judgment was revived in the name of plaintiff's administrator, she having died, and an execution was then issued and levied on the land in controversy, which was sold as the property of Garritson, and bought for the amount of the judgment by Smart & Evans, the securities. They received a Sheriff's deed, and file this bill to remove a cloud from their title. They allege that in 1865 Garritson conveyed the land in question to defendant, Mason; but that there was no valid consideration for the conveyance; and that the conveyance constitutes a cloud upon their title by Sheriff's deed, which relates back to the date of the judgment in 1861, by reason of the lien created thereby, which lien, they insist, continued in force until the levy and sale in 1866.

It is manifest that the lien of the judgment expired in February, 1862, under the decision in *Branner v. Nance*, 3 Cold., 299, unless there is something in the case which kept it alive. It is said by complainant's counsel, that the Court can judicially know that during the late war civil law was suspended, and legal process could not be executed; and for that reason, it is contended, the lien did not expire. The Court can judicially know that a civil war prevailed; but it does not follow that the Court can take judicial notice that

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civil law was suspended in Warren county from February, 1861, to February, 1862, or that Clerks could not issue and Sheriffs could not levy executions and sell lands. No such allegations are made in the bill, nor are any such facts proven. As the question made is not raised by the allegations or proof, it is not necessary to consider it. For anything appearing in the record, the lien expired in February, 1862; and therefore complainants are in no condition to controvert the legal title acquired by Mason in 1865. We may remark, however, that the proof is satisfactory that Mason paid a fair consideration for the land, and that there is no ground to doubt the validity of his title.

The decree of the Chancellor will be affirmed, with costs.

On a petition to re-hear, on a subsequent day of the term, the Court held that the foregoing opinion was correct, and refused to re-hear the cause.

NANCY SMITH v. BENJAMIN JOHNSON, ARAMINTA JOHNSON, *et als.*

1. JURISDICTION. *Conflict of, in Chancery Courts. Cross bill.* Creditors, by final decree in Chancery, can not, by reason of such decree, obtain jurisdiction for that Court, by cross bill to such ended suit, to attack a decree for divorce and alimony subsequently rendered in a Chancery Court for another Chancery District.

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2. SAME. *Notice of debt.* The fact that the wife who obtained the decree for alimony, had notice of the prior decree, or was a party to that proceeding, does not vary this result.
3. SAME. *Dismissal for want of jurisdiction.* A decree based on such a bill declaring the decree for alimony void, is erroneous for want of jurisdiction. Dismissed without prejudice.
4. *Chancery Practice. Publication.* Practice adopted in the alimony suit, making publication for creditors to come in and file claims, approved.
Cases cited: *Deaderick v. Smith*, 6 Hum., 138; *Robinson v. Robinson*, 7 Hum., 440; *McGhee v. McGhee*, 2 Sneed, 221.

FROM WARREN.

In the Chancery Court at McMinnville. What Chancellor presided at the September Term, 1868, does not appear by the transcript.

S. H. COLMS and JAMES S. BARTON for complainants.

CHARLES READY for respondent, cited 6 Hum., 138; Code, 4311; Story, Eq. Pl., § 10.

NICHOLSON, C. J., delivered the opinion of the Court.

The bill in this case is filed as a cross bill, in the case of Benjamin Johnson, executor of John Smith, deceased, filed in the Chancery Court at McMinnville, against Nancy Smith, widow of said John Smith, and his other legatees. The object of the original bill was to have a construction of the will of John Smith, deceased, and to have the advancements to the legatees collated, and the accounts of the executor passed upon and settled. The bill was filed in 1858, and in August, 1866, the matters involved in the litigation were adjudicated and settled, by the confirmation of the Master's report, by which it appeared that the executor was largely indebted to the

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widow, Nancy Smith, and to others of the legatees. The amounts respectively due to the several legatees were ascertained, and by a decree rendered at the August Term, 1866, of the Chancery Court at McMinnville, judgments were rendered against Benjamin Johnson, the executor, for the several amounts, and executions ordered to issue. This decree was final as to all matters involved in the cause. Nothing remained but to collect the several amounts of the judgments, and to accomplish this, executions were awarded.

Soon after the rendition of the final decree, the cross bill was filed in the Chancery Court at McMinnville, by Nancy Smith, and the other legatees of John Smith, in whose favor the judgments aforesaid were rendered, for the purpose of collecting the same. This is sought to be effected by assailing a decree made in the Chancery Court at Murfreesboro, in the case of *Araminta Johnson v. Benjamin Johnson*, rendered at its April Term, 1865. This was a decree for divorce and alimony, and for setting up a resulting trust in land; and the ground upon which it is attacked, is, that the Chancellor, after granting the divorce and setting up the trust, proceeded to decree a portion of Benjamin Johnson's estate to his wife and children, for their support and maintenance; and it is alleged, that the decree so made was a nullity, because there was then pending in the Chancery Court at McMinnville the aforesaid suit against the said Benjamin Johnson, as executor, which was well known to the wife of said Benjamin Johnson, she being a legatee of John Smith, and one of the parties to said suit at McMinn-

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ville; and that, under such circumstances, the Chancellor at Murfreesboro had no legal power to assign as alimony to his wife, property to which his creditors had a superior claim.

When a divorce is granted, the Court is authorized to exercise a sound discretion in decreeing to the wife such part of the husband's real and personal estate as may be deemed proper, according to the nature of the case and the circumstances of the parties. Code, § 2469. But if, in such case, the Court should be too liberal in giving alimony, the error can be corrected only by this Court. Such is the decision in the case of *Robinson v. Robinson*, 7 Hum., 440, in which case there were no creditors concerned.

It is not controverted that the claims of creditors of the husband, in existence before the granting of the divorce, are superior to the claims of the wife for support and maintenance, as held in the case of *McGhee v. McGhee*, 2 Sneed, 221. But it does not follow that a decree for alimony would be null and void, if the amount allowed should be greater than might be consistent with the claims of creditors. Creditors are not generally parties to bills for divorce and alimony, and for that reason the provision made for the wife is necessarily made subject to the unknown claims of the husband's creditors. Decrees, however, when so made by a Court having acquired jurisdiction in pursuance of the statutes, are valid, and can not be held to be nullities, except upon proceedings regularly instituted by creditors for that purpose. But that a decree so rendered in one Chancery District can be reviewed

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and reversed, and pronounced a nullity by a Chancellor presiding in a different Chancery District, is a proposition too clearly erroneous to be countenanced.

The Chancellor at Murfreesboro had jurisdiction of the divorce case, and having found the facts such as to justify a decree of divorce in favor of the wife, his jurisdiction to decree alimony was complete. Upon examination of the decree, it appears that after making a provision for the wife and children, which the Court deemed reasonable under the circumstances, the Chancellor appointed a Receiver to collect a large amount of assets belonging to the husband, who had absconded; and to hold the same for the benefit of his creditors, and to enable all creditors to become parties and to have their rights protected, the cause was held in court and the Receiver ordered to advertise for creditors to present their claims. Instead of availing themselves of the opportunity thus afforded them to bring forward their judgments into the Chancery Court at Murfreesboro, and to contest the rights of the wife to the alimony decreed to her, they elect to file what they call a cross bill in a cause in which there had been a final decree, and by thus misnaming their bill, and engrafting it on a case already disposed of, jurisdiction is sought to be conferred on the Chancellor at McMinnville, to revise and reverse a valid decree made by the Chancellor at Murfreesboro. The Chancellor at McMinnville assumed jurisdiction of the matter, declared the decree made at Murfreesboro a nullity, and ordered his Clerk and Master to proceed to Murfreesboro and sell land, which, by the decree of the Chancellor at Murfreesboro, had been vested in the wife

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of Benjamin Johnson, as her absolute property. In all which there was error: *Deaderick v. Smith*, 6 Hum., 138; for which the decree below is reversed and the bill dismissed, but without prejudice. The costs of this Court, and of the Court below, will be paid by the complainants.

HARRISON SMITH v. ALEXANDER HARRISON *et al.*, and
ALEXANDER HARRISON *et al.* v. HARRISON SMITH
*et als.*¹

1. CHANCERY JURISDICTION. *Will. Fraudulent judgment.* A court of equity will set aside a verdict and judgment of the Circuit Court, had upon an issue *devisavit vel non* against a will, if it appear that such verdict and judgment were obtained by fraud. If, in such case, the will had already been probated in common form, the court will reinstate such probate.
2. EXECUTOR. *His duty to propound the will. Trust, breach of.* It is the duty of an executor to propound the will and sustain it, or relinquish his trust. If it be contested, it is his duty to defend it by counsel and by proof. If he combine with the contestants to defeat the will, it is a breach of trust on his part, and the verdict and judgment against the will thus obtained is fraudulent and void.
3. TRUSTEE. *Fraud. Evidence.* A trustee can do no act inconsistent with his trust, or injurious to his *cestui que trust*. When a trustee takes a benefit under his abuse of the trust or non-performance thereof, a fraudulent purpose will be presumed.
4. EVIDENCE. *Grade of, to establish fraud. Chancery.* In a court of law, as in a court of equity, fraud may be established by circumstances; but in the former, a higher degree of presumptive evidence is required.

¹ The Reporter is indebted to the complaisance of Judge Sneed for this head note.

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5. **HUSBAND AND WIFE.** *Will. Undue influence.* If a testator has a sound, disposing mind, his will, obtained by his wife in her own favor, without fraud or misrepresentation, but by fair importunity, and by the influence she has acquired by affection and kindness, is a valid testament. This is not undue influence, in the sense of the law.
6. **CHANCERY JURISDICTION.** *In adjusting equities. Account.* The court of equity having jurisdiction to set aside a fraudulent judgment against a will in the Circuit Court, and reinstate the probate thereof, has jurisdiction for all purposes, upon a bill which prays also for an account and adjustment of all rights under said will.
7. **SAME.** *Reinstating probate. Remanding for re-trial of issue devisavit vel non.* While a court of equity is not the forum to try an issue *devisavit vel non*, yet, upon a bill to reinstate the probate of a will alleged to have been set aside by a fraudulent judgment, it will take cognizance of the *factum* of the will itself, in adjusting the equities of the parties, to determine whether their equities demand a re-trial at law, or a reinstatement of the former probate, but not to determine the validity of the will itself.
8. **PRACTICE.** *Proceeding in rem. Fraud.* Though a proceeding *in rem*, if fairly conducted, is conclusive against all parties, yet it may be set aside for fraud, as any other decree, judgment, or other judicial proceeding.
9. **TRIAL BY JURY.** *Contested will.* Mere injustice or inequality in the disposition of an estate by will, affords no ground for impeaching it. It is the legal right of the citizen to give his estate by will to a stranger to his blood. And the disposition of juries to set aside wills because of an inequitable disposition of the testator's property, deserves the severe reprobation of the courts.

Cases cited and approved: 7 Hum., 396; 2 Sneed, 631; 8 Hum., 390; 6 Yer., 430.¹

FROM WARREN.

This cause was tried before BARCLAY M. TILLMAN, Ch., at McMinnville. Decree for complainants in the cross bill. The defendants appealed.

S. H. COLMS, for complainant, cited 1 Jarman, 72; 3 Hum., 278, 282; 2 Cold., 74; 1 Swan, 437; 11 Hum., 433; 7 Hum., 388, 393; 3 Head, 662.

¹ See, also, *Hodges v. Bauchman*, 8 Yer., 186.

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L. B. WATERS, with him, cited, in addition, 10 Yer., 84, 93; 8 Hum., 390, 400; 1 Johns. C. R., 402; 3 *Ib.*, 351; 6 *Ib.*, 87, 479; 2 Am. Ch. Dig., 138, 155, 505, 509, § 185; 2 Hay., 342.

A. S. COLYAR cited, in addition, 1 Story Eq. Jur., §§ 64, k, 71, 252, 257; 1 Head, 594; 6 Paige, 47; *Russell v. Clark*, 7 Cranch, 69.

An anonymous brief, on the same side, cites, further, 2 Swan, 162; 2 Sneed, 678.

J. H. SAVAGE, for respondents, cited, on capacity of testator, 8 Yer., (8 Hum., ?) 145; Mod. Prob., 122, 132; 2 Greenl., 688, n. 1. On undue influence, 1 Jarm., 39, 45, 46; 7 Hum., 333; 3 Lead. Cas. in Eq., 127, 145, 148 to 150. Insisted that a court of chancery could not set up a will without an issue, 2 Danl. Ch. Pr., 29; 2 Spence Eq. Jur., 19; that in *John v. Tate*, this question was tried by jury; cited 1 Clinton's Dig., p. 525, § 191. This is not a will lost, destroyed or suppressed, as in *Buchanan v. Matlock*, 8 Hum., 390.

THOS. B. MURRAY, with him. *Devisavit vel non* a proceeding *in rem.*, 1 Yer., 349; 2 Meigs' Dig., 1158; 2 Cold., 74, 75; 5 Ire. Law, 79; 6 *Ib.*, 215; 7 Hum., 320. Criticised *John v. Tate*, 7 Hum., 388.

SNEED, J., delivered the opinion of the Court.

The controlling question in this case, is, as to the jurisdiction of a court of equity, in reinstating the probate of a will alleged to have been set aside upon an issue *devisavit vel non*, upon a fraudulent combination be-

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tween the proponent and the contestants to procure that result; and whether the facts present such a case as will demand the exercise of that jurisdiction.

The testator, Audley Harrison, had been twice married, and left his wife, Elizabeth, and fifteen children, surviving him; ten of whom were the offspring of the first marriage, and five of the latter. On the 28th of November, 1852, and in his last illness, he caused his will to be written, which was witnessed and published on the succeeding day; and on the 30th of November, 1852, the testator died. His wife, Elizabeth, and his son, George Harrison, were nominated in the will as executors.

At the December Term, 1852, of the County Court of Warren county, where the testator resided at the time of his death, the last will and testament was duly probated and entered of record, and the executor and executrix named therein, accepted said trust, and were duly qualified. When the will was submitted for probate, no opposition was made to said probate. The children of the testator's second and last marriage are Alexander, Audley, Thomas, Julia and Mary. The other legatees and devisees are his widow, and the children of the first marriage. At the April Term, 1853, of the County Court, a portion of the latter petitioned for a re-probate of the will, with a view to contesting the same; and the cause was regularly transferred to the Circuit Court for probate, in solemn form, upon the issue *devisavit vel non*. At the June Term, 1853, of said Circuit Court, said issue was submitted to a jury, and there was a verdict and judgment against the will. The executor, George Harrison,

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then took out letters of administration upon his father's estate; and at the time of his death, in 1859, had nearly closed his said administration. He left a last will and testament, of which Harrison Smith was his executor.

The present litigation had its origin in a bill filed on the 20th of August, 1865, by Harrison Smith, executor of the last will and testament of George Harrison, deceased, against Alexander Harrison, Audley Harrison and others, the heirs of Audley Harrison and Elizabeth Harrison, both then being dead. The bill alleges that Audley Harrison died intestate, in 1852, seized and possessed of a large real and personal estate; that a few years after his death, by a judicial decree, the homestead and six hundred acres of land was publicly sold, and that George Harrison, the administrator and the testator of complainant, became the purchaser, and the title was duly vested by decree, "leaving the residue of dower land unsold;" that George Harrison, before his death, in 1859, sold the said homestead of six hundred acres to Elizabeth Harrison, the widow of his intestate, for the sum of \$5,000, for which she and the defendant, Alexander Harrison, executed two notes, the one for \$3,000, and the other for \$2,000, and that said George Harrison executed a deed for the benefit of the said Elizabeth and her five children, Alexander, Julia, Audley, Mary and Thomas; that afterwards, at the September Term, 1859, of the Chancery Court at McMinnville, said contract was presented for confirmation, and was confirmed, and that \$3,000 of said money was thus invested for and belonged to defendants, Audley, Mary and Thomas, leaving the second note unpaid; that said Elizabeth and Alexander were

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placed in possession and have held the same ever since. The bill prays for the sale of the land, or so much thereof as may be necessary to enforce the vendor's lien for the unpaid note of \$2,000.

In the decree of confirmation referred to in said bill, it appears that Elizabeth Harrison was the guardian of her said children, Audley, Mary and Thomas Harrison, and that the \$3,000 paid was the money of her said wards.

The bill is answered by Audley and Alexander Harrison, separately. The former answers on the 2nd of September, 1865, admitting the charges of the bill to be true, alleging that his brother and co-defendant, Alexander, had for many years, had possession of the land, enjoying the rents and profits, and committing waste thereon, and closes with a prayer for an account thereof. Alexander Harrison answered on the 6th of January, 1866, alleging that the proceeding by the complainant was but a continuation of a series of frauds, beginning in the fraudulent devices by which the probate of his father's will had been set aside, and he and his brothers and sisters of the whole blood, defrauded and swindled out of the estates devised to them under said will; that the land for which the note was executed was his own land, and that at the time of the execution of said note he was young, and ignorant of the facts and unconscious of his rights; that the complainant's testator, George Harrison, who had assumed the trust as executor of his father's will, had combined with the other parties, and, by threats and intimidation, had coerced his mother to consent to a verdict against the validity of said will; that he, at the

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time said issue was submitted to the jury, was only fourteen years of age, his brother Audley, ten years of age, and his brother Thomas, six years of age, and with no guardian or protector to look after their rights.

On the 8th of January, 1866, the said Alexander, for himself, and as next friend of his brother Thomas, who was yet under age, filed his original and cross bill, in which Audley Harrison joins as complainant against the complainant in the original bill, and all others, the heirs and distributees of Audley Harrison, deceased, in which these charges are more fully elaborated. The bill charges that the complainants, who were all of tender years when their father's will was set aside, have but lately come to a knowledge of their wrongs; that the complainant, Audley, in making his answer to the original bill of Harrison Smith, executor, had been induced to admit the charges thereof in ignorance of his rights, and by the assurance of complainant that it would be better for him to answer in that way; that the same solicitor who drew his answer, also prepared the original bill against him. The said Alexander, for himself and his co-complainants, avers that the said Audley is of imbecile mind, and the said Thomas of tender years, and the easy victim of imposture; and asks the protection of the Court against all interference with them by defendants, pending this litigation.

The bill assumes to give a historical narrative of the wrongs suffered by complainants, since the death of their father, at the hands of their brothers and sisters of the half blood, and calls for a discovery and answer to its charges. It avers that their father was of sound and

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disposing mind at the time of the making of the will; that the said will was, in every respect, valid; that the same was regularly, and without objection, submitted to probate; that soon thereafter the defendants "set about devising means to destroy the will, and knowing that complainant's mother was the only person interested in the will who could or would stand in the way of their purpose, they commenced a war upon her, threatening to kill her and burn her house if the will was established;" that they finally drove her, a good, but weak and irresolute woman, into a compromise, by which it was agreed that the will should be set aside, and that the property devised and bequeathed to complainants should revert to the estate, to be divided under the laws of descent and distribution; that when the hour for the will case arrived, it was ascertained that the will was suppressed or destroyed, and a copy was substituted by consent; that though all parties were present at the trial, and the witnesses for the will were present ready to sustain it, yet no testimony was adduced; and the judgment, thus obtained by fraud, was rendered, setting aside the will; that George Harrison, "the leader in these frauds," became administrator; that the whole estate had been sold and bought by the very persons most active in procuring said fraudulent verdict and judgment; that the said George Harrison, though the administrator procuring the order for the sale of said lands, bought part of the same himself, and, still further to complicate his fraudulent contrivances, sold said lands to complainant's mother, the complainant, Alexander, subscribing said note for the purchase money while a minor, and in utter ignorance of his

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rights. The bill further charges that since this litigation was begun, some of said defendants have, by menaces against complainants, Audley and Thomas, and by suing complainant for a large amount of damages for an alleged assault and battery, sought to intimidate complainants, and to compel them to desist from the further vindication of their rights. The bill prays that said verdict and judgment upon the issue *devisavit vel non*, be set aside and annulled for fraud, and that said will be set up and established; that defendants be required to account for all moneys or other property of complainants which went into their hands under said fraudulent contrivances, and that all orders and decrees touching said estate, and the sales and transfer of property thereunder, be annulled and avoided.

The answer of the defendants is joint, and denies all charges of fraudulent intentions or contrivances in regard to the contest of said will. It asserts that the whole proceeding was in good faith, and done upon a thorough consideration by the parties and their counsel, of what was for the best interest of all. The defendants avow that they felt keenly the "unequal and iniquitous" distribution attempted by said supposed will; but they deny that they resorted to force, threats, or fraudulent devices, to coerce the mother of complainants to consent to the setting aside of said will. They admit that at the time of the trial of the issue *devisavit vel non*, one of the counsel for the contestants had the will in his possession, or that the same was found after his death, among the papers; that, with the exception of the disposition of one promissory note for a very small amount, the administra-

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tion of said estate, has been closed, and the estate distributed; that complainants have received their share, and that the complainant, Alexander, who is an immoral, dissolute and mischievous person, had long since squandered his share, and should not be allowed to disturb said distribution, without accounting for the large sums of money and the valuable property he has received and squandered; that pending the litigation about the will, the complainant, Alexander, and his mother, in some manner not indicated in the bill, nor shown in the proof, caused the death of a valuable negro woman, named Sarah; that the said Alexander, since he came of age, and since his mother's death, and after he had become acquainted with all the facts connected with the trial of the will case, had offered to pay the note of \$2,000; that two of the negroes given by the will to the children of the first marriage, had been given by the alleged compromise to the complainant, Alexander, and his mother. The answer embodies a demurrer, in which several causes of demurrer are assigned, which, in the view we have taken of this case, are not necessary to be stated. The answer concludes with a positive denial of all fraudulent combination among the defendants, or fraudulent intent on the part of any one of them to do the complainants a wrong, and reiterates the statement that the contest was made in good faith; that able lawyers were in good faith employed on either side, with a view to a fair and honorable litigation upon the issue *devisavit vel non*; that the suit threatened to be a serious and angry one; that the will itself was ambiguous and uncertain in some of its devises; that the title of some of the property devised was not in

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the testator; that in view of all these facts, the counsel and parties on both sides, looking to the best interest of all concerned, and deprecating the result of a long and angry litigation about the will, and, if the same was established, dreading the burden of future suits to settle its construction, advised and adopted a compromise, which resulted in the verdict and judgment complained of, and in the subsequent fair and equitable distribution and partition of the personal and real estate of Audley Harrison.

We have given the substance of all the material averments and charges of the bill and answer, omitting many which are not deemed important for the full apprehension of the equities of the parties as presented in the pleadings.

At the April Term, 1868, of the Chancery Court at McMinnville, the cause was heard, and there was a decree for the complainants in the cross bill, Alexander, Audley and Thomas Harrison. By said decree, the proceeding in the Circuit Court in the issue *devisavit vel non*, was declared to be null and void, having been procured by the fraudulent devices of George Harrison and the contesants; that the same was not binding on the complainants, who were minors, and not parties to said litigation. The probate of the will of Audley Harrison, in common form in the County Court of Warren, was declared to be in full force and vigor, and the same is reinstated. All subsequent sales, transfers and distributions of said estate, were declared to be null and void, and proper accounts were ordered for the adjustment of the equities of the parties, so as to restore them, as near as may be, to their rights under said last will and testament. The original bill of

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Harrison Smith, Ex., was, by said decree, dismissed; and the note for \$2,000, of complainant, Alexander, ordered to be surrendered for cancellation. The costs of the cause were adjudged against the defendants, and a lien declared upon the land of complainants for the fees of their solicitors, the amount of which was ascertained in the decree. The defendants appealed.

The great body of the proof taken, and much of the argument here, is upon the question whether the instrument in controversy was or was not the last will and testament of Audley Harrison; and in the peculiar and rather extraordinary aspect in which the rights of the parties are presented, we are unable to see how the consideration of that question can be ignored or avoided. But we can not, and do not, undertake to decide upon the validity of the will as a testamentary paper. While the court of equity is not the forum for the trial of an issue *devisavit vel non*, yet, in a controversy like this, where its jurisdiction is invoked on account of its efficient remedial powers in such cases, it could take no contracted view in tracing the footprints of fraud; but, in order to the exact adjustment of the equities of these parties, its scrutiny would necessarily reach back to the beginning of this unhappy family feud; for the ultimate disposition of the cause must not be made to depend upon an isolated transaction in the history of this litigation, but upon the equities of these parties, as they have existed from the inception of this controversy.

The Court is asked, on the one side, to declare the proceeding in the Circuit Court of Warren county fraudulent and void, and to reinstate the probate in common

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form of the will of Audley Harrison, or to declare that the same is in full force and vigor. On the other hand, it is insisted that the trial of the issue *devisavit vel non* in the Circuit Court was in the nature of a proceeding *in rem*, and that the result is conclusive against all persons and parties in interest, whether *sui juris* or otherwise, and whether parties of record or not parties. And in this view, the Court is asked to dismiss the complainant's cross bill, and remit the parties to the same status in which that litigation found them; or, if that can not be done, to remand this cause to the Circuit Court for a re-trial upon the issue *devisavit vel non*. It has been correctly assumed in argument, that, if a court of equity has jurisdiction to set aside the judgment of the Circuit Court for fraud and set up the will, then it has jurisdiction for all purposes in adjusting the equities of these parties, as they are affected by said fraudulent judgment. That the Court has this jurisdiction, is not an open question here. It is well settled, that, a court of equity grants relief not only against deeds, writings and solemn assurances, but against judgments and decrees obtained by fraud and imposition. *Reigal v. Wood*, 1 John. Ch. R., 402; 1 Story Eq. Jur., § 252; 7 Hum., 391.

Fraud vitiates and avoids all human transactions, from the solemn judgment of a court to a private contract. It is as odious and as fatal in a court of law as in a court of equity. It is a thing indefinable by any fixed and arbitrary definition. In its multiform phases and subtle shapes, it baffles definition. It is said, indeed, that it is part of the equity doctrine of fraud not to define it, lest the craft of men should find ways of committing

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fraud which might evade such a definition. In its most general sense, it embraces all "acts, omissions, or concealments which involve a breach of legal and equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." 1 Bouv. L. D., 613. A judicial proceeding *in rem*, while generally binding upon all persons, is no more free from the fatal taint of fraud than a proceeding *in personam*, or an individual contract. When once shown to exist, it poisons alike the contract of the citizen, the treaty of the diplomat, and the solemn judgment of the court. It was observed by Lord Hardwick, that, in a court of equity fraud may be presumed from circumstances, but in law it must be proved. 2 Ves. Ch., 155. The more modern doctrine is, that courts of equity will grant relief upon the ground of fraud, established by a degree of presumptive evidence which courts of law would not deem sufficient proof for their purposes; that a higher degree, not a different kind of proof, may be required by courts of law to make out what they will act upon as fraud. Both tribunals accept presumptive or circumstantial proof, if of sufficient force. 1 Bouv. L. D., 613. And among the special cases of frauds against which a court of equity will relieve, Mr. Story enumerates frauds in verdicts, judgments, decrees, and other judicial proceedings. 1 Story Eq. Jur., § 252.

A trustee can do no act inconsistent with his trust or injurious to his *cestui qui trust*, and if he takes a personal benefit by such act, a fraudulent intent will be presumed upon very slight proof. Thus, one who assumes the execution of a will takes upon himself a solemn trust,

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in which his duties and his obligations are clearly defined by law. It is said by this Court that he is bound to maintain the validity of the will, if it be assailed, by the employment of counsel and the production of proof, and if he combines with others to defeat it, and it is set aside, those interested in its establishment, not being parties, may file their bill to have it established; and that when a court of equity sets aside the finding on an issue *devisavit vel non*, against a will which has been previously proven, the probate is reinstated, and the parties to the suit in equity are concluded by a restoration of the probate. *John v. Tate*, 7 Hum., 388; et vid, *Buchanan v. Matlock*, 8 Hum., 390.

This Court, then, having the undoubted jurisdiction to inquire whether the probate of the will of Audley Harrison was set aside and vacated by reason of the fraudulent practices of the defendants, has jurisdiction for all purposes in the settlement of the rights of these parties growing out of that result. And in the exercise of that jurisdiction, it must consider the *factum* of the will itself, not to assume the prerogative of a court of law in determining the issue *devisavit vel non*; but in order to ascertain whether the equities of the parties demand that the cause be remanded for a re-trial on that issue, or whether the proper judgment should be, that the first probate be reinstated. This is not a case in which, in the language of Chancellor Walworth, the part over which this Court has an unquestionable jurisdiction, necessarily draws to it the decision of the question as to the validity of the will. *Brown v. Idley*, 6 Paige Ch. R., 50. With that question this Court has nothing to do. But without

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wandering from the proper sphere of a court of equity, we must yet briefly review the circumstances from the beginning, which have culminated in the alleged fraudulent proceeding in the Circuit Court, in order to understand the precise equities of these parties.

The learned counsel on both sides have happily anticipated this necessity in the adjudication of this cause, and have addressed themselves with great ability to the examination of the equities of the parties from the beginning. And to demonstrate these equities, the greater part of the vast volume of proof taken in the cause, has been directed.

While the fairness and justice of the family settlement and compromise agreed upon between the parties, can not in any degree affect the rights of these complainants, who were not, and could not be, parties thereto, we may concede that most of the parties acted in good faith and upon their best judgment as to what was for the best interests of both the complainants and defendants. If it be true, as alleged in the answer, that the counsel on both sides, who are known to be honorable men, had, with a view to prevent a long and angry litigation in having the will established, and to avoid the burdens of the many suits which might follow to settle its construction, advised the compromise which was adopted, then we might almost commend the motive if we condemn the imprudence of one of them, who, it is said, suppressed the original will, and of whom we are unwilling to believe that he could have been actuated by any corrupt or fraudulent purpose.

The will of Audley Harrison has been characterized

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by the defendants, who are his children, as an “unequal and iniquitous” disposition of his property. The mere fact that a testamentary paper is unfair and inequitable, of itself, furnishes no reason to repudiate that paper as a valid testamentary act. As an isolated fact, it can only generate a bare suspicion that there has been on the one hand fraud and improper influences in procuring the will, or on the other, a want of that disposing mind without which there can be no will. It may be observed that there is among juries of the present day, and especially in this State, a mischievous proclivity to set aside wills on the slightest grounds, if there be the semblance of inequality in the testamentary dispositions. Though it springs from an instinct of natural justice, yet nothing could be more pernicious in its consequences. The harmony of the domestic hearth, the reverence due to parental authority, the comfort of decrepit old age, the filial piety of youth, the inducement to industry in the acquisition of property, all more or less depend upon the sanctity of the testament, and the valued and unrestrained prerogative of the citizen in disposing, upon his own volition, of the property he has acquired by long years of honorable toil. It was observed by an eminent jurist of this State, that here, where the laws dispose of estates in a manner so consonant to the principles of justice and the feelings of an enlightened community, there can be no reason why the courts, by an over-solicitude to establish wills, should so greatly expose the heirs and next of kin to be defrauded. *Suggett v. Kitchell*, 6 Yerg., 430. This remark, as it was intended in that case, was eminently right and proper; but, as interpreted in others, it has

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been most prolific of mischief. The object of the law of descent and distribution was certainly to provide for a just and equitable distribution of the estates of such persons as should die intestate among the heirs and distributees who are entitled to the property. It reserved to the citizen, however, the right to dispose of his whole estate by last will and testament; and this is among the rights held most sacred by the law. It is among the boasts of our fervid freedom, that, in the exercise of that right, he may, if he chooses, ignore the claims of wife, children, parents, brothers and sisters; and he may adopt as the object of his bounty some stranger to his blood, and thus repudiate the dearest ties of gratitude and affection.

If it be true, as intimated in the proof, that Audley Harrison, after his second marriage, did not get along very harmoniously with the children of his first marriage, then the will is a marvel of parental leniency, as only one of them is entirely disinherited; and the reason of the old man's long-cherished purpose as to her is abundantly shown. This is Nancy Hennessee. It seems from the proof that, at the time of the preparation of the will, the testator was very ill and much under the influence of opiates. But the law takes no cognizance of mere physical infirmity as an objection to a will, if the disposing mind be manifest. *Nailing v. Nailing*, 2 Sneed, 630. He would sleep most of the time. When it was announced that the draftsman of the will had arrived, he turned over in bed and said to his wife, who was sitting by the bed-side: "I have long intended to write my will. I now intend to do it; for they

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will take everything from you and your children. I intend to fix it so they can not do it." He then proceeded to dictate the terms of the will. He would fall asleep in the intervals of writing, and on being aroused again, he would call for the reading of what had been written; then dictate another item, and so on to the close. When the will was witnessed and published, it was read over to him while he sat up in bed, and he said it was about as good as he could make it. In the course of its preparation he said he did not wish Mrs. Hennessee to have any of his estate. His wife observed that she had raised Mrs. Hennessee, and asked him to make her equal with the rest. But he was obdurate and determined. His wife also reminded him that he had forgotten Nelly McGregor, also a child of his first marriage; and she was remembered in the will. In his last hours the testator was irritable. The defendant, Milly Smith, one of the children of the first marriage, who was made a witness for defendants, testified as follows: "My step-mother handed the will to him to sign. I heard my father say, 'Give it here; if I do not sign it very soon, it will be too late. I don't know but it is too late now.' My father said to me that I would have to help him up and sit at his back. My step-mother handed him the will. He remarked that for one cent he would not sign it to save her life, as he did not know what was in it, nor did he care. He signed it, and said he did not know whether he had done it or not, or whether it would do or not. After he laid down he remarked that she was crying and whining around him, and that he did not know what it was for."

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It is stated, however, that the testator dictated the whole will himself, except at the suggestion of his wife he changed the bequest of a negro to one of his sons by substituting another in his stead, in conformity with what seems to have been his previously expressed intention. He now and then, according to the testimony, asked the suggestions of his wife; but she refused to give them, except to intimate her choice as to certain sheep and hogs which were the subject of bequest at the moment. It was stated by the subscribing witness and others, that the testator was a man of firm and determined character; that, though physically feeble, he was thoroughly at himself when the will was dictated and prepared; and that on the day after the scene related by Milly Smith, while sitting up in bed, he had the will read to him; said it was as good as he could make it, and requested the witness to attest it as his will. It is stated, also, that he was devotedly attached to his wife, and that his greatest trouble in dying was in parting with her. That his wife should have been anxious to have the will written, and her children and herself provided for, was most natural, and not improper; that she used any fraudulent or undue influence to have herself and her children preferred, it is not proper to be inquired of in this proceeding.

It was among the quaint sayings of Swinburne, that it is not unlawful for a man, by honest intercessions or modest persuasions, to procure either another person or himself to be made executor; neither is it altogether unlawful for a man, even with fair and flattering speeches, to move the testator to make him his executor, or to give

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him his goods. Redf. on Wills, 519. And it is said that the influence to render a will void must be intentionally exercised, so as to overcome free agency, by the seduction of flattery, importunity, false information, or menaces. The influence resulting from habitual confidence, or even deference, on the part of the testator, acquired by affectionate attentions or general kindness, will not be sufficient for that purpose, unless addressed to a mind of unresisting imbecility, and which has lost the power of self-direction. *Martin v. Teague*, 2 Speed: 268.

In the view we have taken of this case, we do not think it a proper case to be remanded for a re-trial of the issue *devisavit vel non*, even if that question were properly before us, in the state of the pleadings.

It remains to consider the effect of the proceeding in the Circuit Court of Warren county, by which the will of Audley Harrison was set aside and destroyed. George had assumed the execution of his father's will. The widow, who is described as a weak and irresolute woman, was nominally an executrix, but George Harrison was the active, leading spirit, controlling the affairs of his father's estate. A message from his dying father, had overtaken him on the piazza of his father's house. The old man wished to know if George would become his executor, if not required to give security. The witness states that George, after a little reflection, consented. In a few days he entered upon his solemn trust. He was charged with the interests and fortunes of his three young half brothers and two young half sisters, who were unable to protect themselves. He was sworn to execute and carry out his father's will. We find him sending mes-

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sages to his step-mother, admonishing her that if she does not consent to set aside the will they will give her trouble. He does not threaten her himself, but he warns her of what others will do. We find it stated that others are threatening to burn her house if she does not compromise. Thus standing alone, amid her troop of little children, she finally consented to a compromise, by which those children were defrauded of their rightful patrimony. The issue upon the will is ready to be tried. The subscribing witnesses and all others are present, and ready to sustain the will. The original script is lost, and can no where be found. It is ascertained, afterwards, to have been in the possession of one of the counsel. The Court suggested that a copy from the records of the County Court would answer. A copy was procured. The jury were sworn, and the Court commanded that the trial proceed. George Harrison, whose duty it was to call in his witnesses and sustain the will, whispered to his counsel, instead. Forrest and Paine and others, were there, ready, it is said, to establish the will by their testimony. But no witness was called within the bar or examined. George Harrison having whispered to his counsel, the lawyer arose and addressed these words to the Court: "May it please your Honor, we cannot sustain the will." At this instant, the contrivance was so noticeable and patent to the idle multitude behind the bar, that the witness, Martin, states that when this scene occurred between George Harrison and his lawyer, a man near him whispered these words into his ear: "Don't you see that? That makes George Harrison an heir." The jury at once

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pronounced a verdict against the will, upon which the Court rendered judgment, and thus ended the trial.

On such a case as this, the complainants have not appealed for relief in vain to a court of equity. That forum would defile its *prestige* as a court of conscience, if it gave its sanction to such a transaction. If there be one thing above another which may be said to adorn the jurisdiction of a court of equity, it is its jealous readiness in vindicating the integrity of a trust.

The decree of the Chancellor is, in all things, affirmed; the probate of the will of Audley Harrison is reinstated, and declared to be in full force and vigor; and this cause is remanded to the Chancery Court at McMinnville, to be proceeded in according to the decree of the Chancellor.

Afterward, on the 14th of January, 1871, the following opinion was delivered:

A motion is made at the bar to remodel the decree in this cause pronounced at a former day of this term, so as not to preclude the parties from ascertaining by judicial inquiry, the true interpretation of the testator's will as to what particular lands or other property, was devised or bequeathed by said will to complainants. The opinion of the Court, heretofore announced in the cause, does not preclude such an inquiry; nor does the decree of this Court or the court below; nor are the parties precluded by either from any remedy known to the law, by which the validity of the will itself, or the interpretation thereof, may be tested and ascertained. The doctrine of the

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opinion is, that the Chancery Court, having jurisdiction to declare the judgment of the Circuit Court in setting aside the will void for fraud, had jurisdiction, also, to adjust the equities of all the parties, so far as they are affected by such fraudulent judgment, and so far as these equities can be considered in this cause upon the state of the pleadings; that, having ascertained that the paper writing purporting to be the will was once duly probated, and that said probate is still in full force and effect, it must be treated as a will until the contrary be made to appear. This was the basis of the decree below. The decree of the Chancellor was affirmed here, in all things. But that decree does not undertake to interpret the will or to designate the particular lands intended to be devised to the complainants. The writ of possession decreed by the Chancellor is ordered to issue 'to place complainants in possession of the several tracts of land devised to them in the will of their ancestor, Audley Harrison.'" But it does not assume to designate what land it is, nor does it identify the land as the land described in the pleadings; but it gives the writ of possession for the land devised by the will. If the Sheriff, in executing said writ, seeks to put complainants into possession of any land not devised by the will, the defendants have their remedy, which is in no respect embarrassed by the decree below, which is in all things affirmed by this Court.

The decree heretofore entered may, however, be so changed as to interpret more clearly the judgment of the Court, as herein indicated.

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NOAH WRIGHT, Plaintiff in Error, v. ANDERSON WINNINGHAM.

1. **BELLIGERENTS.** *Capture. Party advising or aiding.* A capture of a Federal soldier by Confederate soldiers, under orders, does not subject a citizen giving aid and advice to the Confederates to any civil liability. *Smith v. Brazelton*, 1 Heis., 44, reaffirmed.
2. **VERDICT.** *Effect on facts.* Verdict may be regarded as settling questions of fact as to which there is conflict of proof.
3. **EVIDENCE.** *Relevancy.* Where a plaintiff captured during the war, was permitted to prove what prisoners in particular prisons endured, without any proof that he was kept at such prisons, the evidence was held irrelevant, and its admission error.

FROM OVERTON.

In the Circuit Court, W. W. GOODPASTURE, J., presiding.

E. L. GARDENHIRE, for plaintiff in error.

JOHN P. MURRAY, for defendant.

NELSON, J., delivered the opinion of the Court.

On the trial of this action for trespass, assault and battery and false imprisonment, it was in proof that the defendant in error was a soldier in the United States army, absent on leave; that George Threat and others, who were soldiers in the rebel army, and under the command of Colonel F. H. Dougherty, a regular officer in the rebel service, were permitted by him to go into the neighborhood where defendant in error was; that Threat and his associates were expressly ordered by

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their commanding officer to arrest and bring into camp any Federal soldier whom they could find; that, in obedience to this order, they started "on a scout;" and learning that defendant in error was at home, surrounded his house about daylight, and captured him; and that he was guarded and taken, by way of Livingston, to Chattanooga, where, it may be inferred, he was detained as a prisoner, some time in the year 1862, but the precise date of the arrest, and nature and duration of the imprisonment, are not stated in the record. It appears that the plaintiff in error was not present at the arrest; but several witnesses, as to whose credibility the evidence is conflicting, testified that the plaintiff in error, who was a rebel, admitted that he had "let the soldiers have a horse and saddle and a gun, to go and capture" the defendant in error; expressed himself in strong terms in favor of the arrest, and approved the same after it was made. One of the captors testified that the plaintiff in error was ignorant of their intention to make the arrest; and that they took his horse and gun without his knowledge or consent. But, without critically weighing the credit of the witnesses or the force of their testimony, it may be assumed, after the verdict of the jury in this case, that there was evidence to satisfy the jury that plaintiff in error aided and abetted in making the arrest, and afterwards fully sanctioned and approved it. Among other things, the Circuit Judge instructed the jury, in substance, that if the plaintiff below was a Federal soldier, and was arrested by Confederate soldiers, under orders of their commander, through the advice, information or encouragement

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of the plaintiff in error, who was a citizen, the fact that the parties who made the arrest were rebel soldiers, acting under the command of a superior officer would be no protection or justification to the defendant in error.

Without particularizing the objections to this charge, we hold that it was contrary to the principles declared in the case of *Smith v. Brazelton*, recently determined at Knoxville, 1 Heis., 44, and that the arrest and imprisonment of defendant in error, made, as they were, in obedience to the command of a superior officer, were lawful acts of war; and that, in the absence of proof of express malice, the plaintiff in error was not a trespasser in either procuring or encouraging such arrest. The principles declared in that opinion were very carefully considered before they were promulgated, by the whole Court; and satisfied, as we are, that they are well sustained by reason and authority, we do not regard it as our duty either to modify or retract them.

It appears from the record that two witnesses, who had been confined in rebel prisons—one of them at Belle Isle prison, at Richmond—were permitted to detail their sufferings and bad treatment in those prisons; and this in opposition to the direct objection of plaintiff in error to the admissibility of the evidence, and, also, when there was no proof that the defendant in error was confined in any, or, if in any, in what prison.

It would be superfluous to cite authorities to show that the sufferings and bad treatment of persons who were not parties to the suit, and in no way connected with the cause, could not, upon any conceivable legal principle, be rightfully admitted as evidence in a suit

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with which such bad treatment and sufferings had no earthly connection. The admission of such testimony was a grave error. It was foreign to the cause, but well calculated to create prejudice in the minds of the jurors.

Without commenting on the verdict itself, or the strong affidavits presented on the application for a new trial, which tend to show that it was, in legal parlance, a "gambling verdict," we hold that his Honor, the Circuit Judge, erred in refusing to grant a new trial; and accordingly reverse his judgment and remand the cause.

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CONFEDERATE SOLDIERS. *Not a duty to desert.* A Confederate soldier, hired as a substitute for a conscript, was not under any obligation to desert, and incur the penalty of desertion.

2. JURY. *Franchise laws.* To exclude a citizen, otherwise qualified, from a jury, because he did not have a certificate as a voter, under the franchise law, was error.

Cases cited: *Lay v. Huddleston*, 1 Heis., 167; *Nance v. Haney*, 1 Heis., 177.

FROM PUTNAM.

In the Circuit Court, before A. McCLAIN, J.

HOLLAND DENTON, for plaintiff in error.

NELSON, J., delivered the opinion of the Court.

Without detailing the amendments of the warrant, made from time to time, in the Circuit Court, this may

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be described as a suit for damages, originating before a Justice, 5th September, 1865, against the plaintiff in error, "for the taking and converting of a horse," to the damage of the plaintiff, below one hundred dollars. The Justices who tried the cause rendered judgment for \$150, from which the plaintiff in error appealed to the Circuit Court of Putnam. Verdict and judgment were rendered against him, at January Term, 1867, for \$32.50, and costs, from which, failing to obtain a new trial, he prosecutes this appeal to this Court.

The evidence contained in the record establishes, substantially, the following facts, viz:

Gunter, the plaintiff in error, was a soldier in the late Confederate army, having been hired by one Whitson, who was a conscript, as his substitute, and came home upon furlough in 1863, "to save his small grain." Upon attempting to return to his command, he was cut off by the Federal forces, and went back to his home. Under the authority of Brigadier-General Pillow, a Captain Lowe was at this time engaged in raising a company for the Confederate service, and Gunter, being afraid to fall into the hands of the Federal forces, and unwilling to join Lowe's company, was, in the language of the witnesses, "lying out," for the purpose of avoiding both, but, being discovered by Lowe, was compelled to join his company, with which he remained a short time, when the company was disbanded. Lowe's company took horses, salt, and other property from the citizens. Among others, they took the horse of Patton. Gunter was present at, but did not participate in, the taking. One witness, a brother-in-law to Patton, who was not summoned till

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a short time before the trial, states that he afterwards saw Gunter, "along with a portion of the company," riding the horse, in August or September, 1863, and that when witness said the horse was Patton's, Gunter "tucked down his head and sneaked off into the orchard to get some apples." Another witness states that he was with the company when the horse was taken, and heard Gunter urging Captain Lowe to give up the horse to Patton, because he was an old man and lame, and says, Gunter "had nothing to do with the taking of the horse."

The value of the horse was variously stated at from \$110 to \$140. It was further shown in evidence that the general reputation of Gunter for honesty and integrity was good; and his daughter, among other things, testified that, while her father was with the company, she "heard him speak of Captain Lowe taking plaintiff's horse, and about the taking of things from a wagon; and expressed himself as being opposed to it, and that he intended to leave the company on account of the way it was doing, and that he did leave the company and lay out to keep from going any longer with the company."

On this state of facts, his Honor, the Circuit Judge, instructed the jury, among other things, that if the band or association of men "were banded together for the purpose of taking booty, and were marauders, they were associated for an unlawful purpose. If they were associated together for the purpose of gathering up conscripts, or other Confederate rebel soldiers, for the purpose of returning them to their command, this also was an unlawful purpose; and this was so even though Lowe, the commander of the squad, may have had a commission or au-

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thority from some superior officer of the rebellion, authorizing him to do this thing." According to the case of *Smith v. Brazelton*, and various other cases recently determined by us at Knoxville, we hold that, with the exception of the first sentence, this part of his Honor's charge was erroneous.

After declaring to the jury that whatever men may think of the rebellion, or say, in the social circle, as to the obligations of honor; treason, in legal contemplation, is a crime of the highest grade; his Honor proceeded to state that "The law demands of those who are, against their will, conscripted and thus drawn into the rebellion, to leave off and escape as soon as, with safety, they can do so, and will recognize no points of honor as an excuse for doing otherwise." His Honor further charged the jury that if the defendant voluntarily remained with the company after he discovered that they were associated together for an illegal purpose, "and the horse was taken in pursuance of their illegal purpose, the defendant is liable, even though, in this particular instance, he actually opposed the taking of the horse; for the law will not allow that a person may voluntarily associate and connect himself with a band of men confederated together for an illegal purpose, and then excuse himself for what may be done in pursuance of the object of the association, on the ground that, in the particular instance complained of, he disapproved the act. If you find, from the evidence, the defendant connected himself with these men, and remained with them through constraint, his will being *overdone*, and disapproved the taking of the horse, you will find in his favor. And, upon this point, you can look

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to any peculiarity in his conduct at the time, in connection with the condition of the country, his disengaging from their immediate presence, and again meeting with them, and all other features of the testimony bearing upon this question."

The cases of *Lay v. Huddleston*,¹ and *Nance v. Haney*,² recently determined at Knoxville, were, in some respects, similar to this; but this is the first case before us, and so far as we are informed, the first case before any revising tribunal, in which it has been virtually asserted as law, that a soldier engaged in military service is under a legal obligation to become a deserter. Pretermittng, as the Circuit Judge directed the jury, all considerations of "honor," the principle announced is most startling when considered only as an abstract question of law. Whatever difference may exist, in judicial opinions, as to the nature of the Government of the Confederate States of America, or as to the manner in which belligerent rights were acquired during the late civil war, it is now universally conceded that such rights in fact existed, and we will not here again consider the manner in which they were acquired. Under the laws of war, as recognized and promulgated by both belligerents in the late civil war, desertion from either army was punishable with death; and the position that a soldier in either army was under a legal obligation to incur this penalty, is simply monstrous. Even in England, (where the law of treason was, in former times, stretched to the utmost tension; and where so vast a variety of acts were held to amount to that offense, that

¹1 Heis., 167.²1 Heis., 177.

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the framers of our national Constitution felt it necessary to define the crime with precision, and to circumscribe it within narrow limits,) it was held, before the American Revolution, that a temporary allegiance was due to a King *de facto*, to an usurper, and that any one who compassed or imagined his death was guilty of treason.

Blackstone, who wrote before our Revolution of 1776, and long before our late civil war, and whose opinions could not by any possibility have been influenced by any events in American history, declared that when "an usurper is in possession, the subject is excused and justified in obeying and giving him assistance; otherwise, under an usurpation, no man could be safe, if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do, for disobedience. Nay, further, (continues this most able and popular expounder of the law,) as the mass of people are imperfect judges of title, of which, in all cases, possession is *prima facie* evidence, the law compels no man to yield obedience to that prince whose right is, by want of possession, rendered uncertain and disputable, till Providence shall think fit to interpose in his favor and decide the ambiguous claim; and therefore, till he is entitled to such allegiance by possession, no treason can be committed against him." 4 Bl. Com., 78, m. Vattel declares, book 1, p. 97, § 202, that "the State is obliged to defend and preserve all its members, and the prince owes the same assistance to his subjects. If, therefore, the State or the prince refuses or neglects to succor a body of people who are exposed to imminent danger, the latter, being thus abandoned, become perfectly free to provide for their own safety and preser-

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vation in whatever manner they find most convenient, without paying the least regard to those who, by abandoning them, have been the first to fail in their duty."

Viewed in the light of the Constitution and laws of the United States, and considering the Government of the Confederate States as a failure, there can be no question that while said Government continued it was a usurpation. But the duties and obligations of citizens residing within its limits were not, and could not from the necessity of the case be, the same in a state of war that they were in time of peace. New, but temporary, duties and obligations arose which, it is impossible for sophistry to ignore. The authority of the rightful Government was displaced by the red hand of war. The allegiance of the citizen was suspended so long as the corresponding duty of protection could not be performed on the part of the Government. But when the Government resumed, and was able to maintain its authority, and to protect the citizen against the power of the usurper, the obligation of allegiance revived. Meanwhile, so long as the usurpation was enabled to maintain its authority, and to compel or permit the citizen to join its armies, and to keep those armies in the field, a soldier in that service could not take, nor was he required by any law, human or divine, to take upon himself the responsibility of determining, while the war and his relation as a soldier continued, when it would be safe for him, by desertion, to brave the military power that controlled him. If caught in the act of desertion, no fantastic or quixotic notions of sublimated patriotism would save him from the penalty of an ignominious death, and it is unreasonable to

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require that he should incur such hazard. The charge of his Honor was, in this and other particulars, radically erroneous; but the errors are too obvious to require further discussion.

The record shows that, after each party had exhausted his challenges in the selection of the jury, two persons, who were admitted to be in every other respect qualified, were peremptorily challenged by the defendant in error, because they had no certificates as voters, under the recent franchise laws, and were excluded from serving on the jury. We hold that his Honor also erred in this, as those laws were, in several of their provisions, *ex post facto*, and unconstitutional; but as they have been repealed, and there are other grounds of reversal in this case, we abstain from entering upon the wide field of discussion which would open before us in assigning reasons for our opinion.

Reverse the judgment, and remand the cause.

WILLIAM HACKETT, Plaintiff in error, v. PHERABEE J. BROWN, by her next friend.

1. ERROR. *Verdict. On doubtful proof.* A doubt as to the correctness of a verdict does not authorize a reversal in the Supreme Court, in a civil case; but it imposes upon the Court, more imperatively, the duty of scrutinizing the incidents of the trial, and the other errors assigned in the record.
2. EVIDENCE. *Impeaching a witness.* It is error to charge that when the credit of a witness is questioned, you try it as you would any other fact

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in the case, without stating the rules by which it is tried more fully. *Kinchelow v. State*, 5 Hum., 9, 13; *Whitesides v. State*, 4 Cold., 180.

3. **ERROR.** *Charge of Court. Must apply to the facts.* A Court must charge the jury, not in remote and impalpable generalities, but as applicable to the facts, so as to aid the jury in arriving at a correct conclusion. *Wilson v. Smith*, 5 Yer., 379; *Turbeville v. Ryan*, 1 Hum., 113; 5 Yer., 453; 2 Swan, 237; 1 Head, 209; *Ib.*, 610; 2 Head, 565.
4. **SLANDER.** *Provocation or passion, in mitigation.* In the action of slander, the fact that words are spoken in anger and under provocation, may be looked to in mitigation of damages.
5. **ERROR.** *General charge, how affected by refusal to charge on particular point.* A general instruction, that the jury may look to all the facts and circumstances, may be restricted in its effect by a request for specific instruction, that a particular fact may be looked to, and a refusal of the Court so to charge.
6. **SLANDER.** *Reputation of plaintiff. Suspicion.* On the trial of an action of slander, for words imputing a want of chastity, on a plea of not guilty, it is not allowable to prove the general reputation and belief of the community, that the house in which the plaintiff resided was a house of ill fame. See 11 Hum., 507, 508.

Code cited: 3400.

Statute cited: 1804, c. 1.

FROM SMITH.

In the Circuit Court, A. McCLAIN, J., presiding.

S. M. FITE, W. H. DEWITT, JAMES W. MCHENRY,
for plaintiff in error.

J. W. HEAD & SON, and SWOPE, for defendant.

FITE and DEWITT cited *Kinchelow v. State*, 5 Hum., 12; *Fleming v. State*, 5 Hum., 564. On the admissibility of evidence of the character of the house, they cited *Gilmer v. Lowell*, 8 Wend., 573; *Root v. King*, 7 Cow., 613; *Larned v. Buffington*, 3 Mass., 546; 2 Wh. Selw. N. P., 1283; Hil. on Torts, p. 403, § 67; 2 Wharton, 314; *West v. Walker*, 2 Swan, 34; *Shirley v. Keathy*, 4 Cold., 30

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Words spoken in anger, 2 Wh. Selw. N. P., 1267; 3 Mass., 553; 4 N. Y. Dig., 1041; 2 Greenl., 223, 425; Wend. Starkie Sl., 27, 55.

DEWITT & MCHENRY cited, in addition, 2 Greenl., 421. Jury to judge of provocation and effect, 1 Hil. on Torts, 3 ed., 405, 407; *McCrane v. Clay*, 24 Ala., 235; *Watts v. Frazier*, 7 Ad. and Ellis, 223; 1 Md., 173; *Child v. Haner*, 13 Pick., 503; *Hotchkiss v. Lothrop*, 1 Johns., 286; *Haywood v. Foster*, 16 Ohio, 88. Suspicion may be shown to disprove malice, *Gilmer v. Eubank*, 13 Ill., 271; *Watson v. Moore*, 2 Cush., 133; *Bush v. Prosser*, 2 Kern., 847; 1 Hil. on Torts, 377, note.

SWOPE, for defendant, on instruction asked as to character, cited Hil. on Torts, 379, § 23; Townsend on Sl., 115, § 414, 417; *Wilson v. Nations*, 5 Yer., 211; Sedgw. on Dam., 4 ed., top, 634; *West v. Walker*, 2 Swan, 32; *Shirley v. Keithy*, 4 Cold., 29; *Harman v. State*, 3 Head, 243.

HEAD & SON, as to evidence of character, cited *McGee v. Sodusky*, 5 J. J. Marsh., 185; Townsend on Sl., § 406, and n. Request for instructions, *Wilson v. Nations*, 5 Yer., 211, 213; *Flint v. Clarke*, 13 Conn., 361. Words spoken in passion, *Dolerin v. Wilder*, 34 How. Pr. R., 488; *McClintock v. Crick*, 4 Iowa, 453; 1 Miles, 146; 3 Ind., 518; 3 Mass., 546; Townsend on Sl., § 414. Source of provocation, *Larkins v. Tarter*, 3 Sneed, 681.

NELSON, J., delivered the opinion of the Court.

The defendant in error, being a minor, brought this action under the Code, 3400, which declares that "any

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words written, spoken or printed of a person, wrongfully and maliciously imputing to such person the commission of adultery or fornication, are actionable, without special damage." Such words were not actionable at common law, and redress against such slander could be obtained in England through the spiritual courts only; but they have been actionable here since the act of 1804, ch. 1; 1 Scott's Rev., 852. The declaration is for verbal slander. Issue was taken upon the plea of not guilty, and after one mistrial, verdict and judgment was rendered in favor of the plaintiff below for one thousand dollars and costs, from which plaintiff in error appealed.

On the trial, in the Court below, two witnesses testified to the speaking, by plaintiff in error of part of the words laid in the declaration, and clearly imputing fornication. These witnesses were assailed, in the progress of the cause, by their own admissions that they were unfriendly to plaintiff in error, and were further attacked, partly by proof as to contradictory statements, and in part by evidence discrediting them from their general reputation; but a larger number of sustaining witnesses swore, that, from their knowledge of their general characters, they were entitled to credit upon oath. Some of the witnesses thus testifying were in turn assailed; but as the credibility of all the witnesses was peculiarly and appropriately a question for the jury, it is not necessary, under a long and well established rule of this Court, to enter upon a critical and extended examination of their respective claims to credit.

The general character of the defendant in error, as to chastity, was also assailed upon the trial; and it was

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shown by the evidence of ten witnesses, varying much in their degrees of knowledge, that her general reputation before the commencement of the suit was that of an unchaste woman, while upon the other hand, five witnesses testified as to her good character in that respect; and it may be inferred from the entire proof that she was quite young, and had established no very general character of any sort.

It is impossible, however, after a careful examination of the entire evidence set out in the record, to avoid the conviction that the verdict was rendered in favor of a plaintiff of doubtful character, upon the evidence of witnesses of doubtful credit. While this conviction does not, of itself, afford sufficient ground upon which to reverse the judgment, it imposes a more imperative duty to scrutinize the incidents attending the trial, and to consider the errors in law which are alleged to have occurred during its progress.

It seems, from the evidence, that one of the sons of the plaintiff in error was, in the language of the witnesses, engaged in "courting" the defendant in error; that her chief witness was the Mercury, or go-between; that her suitor had sent her "a white handkerchief with four grains of spice in it," and that she had sent him "a letter containing a hickory tooth-brush and three grains of spice." What enigmatical meaning was attached to these symbolic missives, or whether they were to be regarded as signifying love or hatred, or as dimly foreshadowing the action of slander, does not appear from the record; but it does clearly appear that the son's courtship was carried on without the knowledge

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of his father or mother; that his mother, on discovering the letter, threw it into the fire and burned it; and that his father was so exasperated, that "he whipped him severely with a switch, and cut the blood out of him, about the letter." It may be inferred, though it is not clearly proved, that, soon after the discovery made by the parents, the principal witness, who had acted as the mutual friend of "the young people," visited the plaintiff in error at his house; and on the way from it to his still-house, plaintiff in error told the witness that "he had a crow to pick with him, because he understood witness had been courting between his son Thomas and the plaintiff." The witness denied it. The plaintiff in error then swore that the defendant in error was a very mean woman, and charged that he had caught her in the act of fornication with a person named, who afterwards swore, upon the trial, that no such occurrence took place.

The slanderous words were proven by two brothers, testifying to the same conversation, and do not seem to have been uttered on any other occasion. It seems that one of the sons of plaintiff in error was, during the interview or altercation, called in to prove the agency in the courtship of the principal witness, who became infuriated, drew his knife and made strong threats. There is also evidence tending to show that both witnesses for defendant in error were intoxicated, or under the influence of liquor, at the time of the alleged conversation. One of the sons of the plaintiff in error testifies that he heard all the conversation; that no charge of fornication was made; but that his father did say, with an oath,

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that "he was a poor man, and before his son should marry into such a family, he would kill him, and bury him on credit;" and this latter statement is substantially corroborated by two other witnesses.

Without analyzing the other evidence, as to the contradictory statements alleged to have been made by the principal witnesses as to what occurred at the time of the utterance of the alleged slanderous words, it is obvious, from the facts appearing in the record, that his Honor's charge to the jury was not sufficiently full and explicit as to the rules by which they were to be governed in weighing the credibility of the witnesses; and that, as given, the charge was calculated to mislead.

After stating, very briefly, that a witness may be discredited by the evidence of witnesses who would not believe him on oath, from their knowledge of his general character; or sustained, in like manner, by witnesses who would believe him; that he may be impeached, by proving that he made "certain material statements" which he denies; or that "his swearing in reference to material matters may be contradicted by the testimony of other credible witnesses in reference to the same matters," his Honor instructed the jury further, as follows: "When a witness's credit is questioned, you try it as you would try any other fact in the lawsuit, looking to all the evidence in the case bearing upon that subject, and determine whether he is worthy of credit or not."

But, in order to enable the jury, in view of all the evidence in this cause, intelligently to try the fact of the credibility of the two leading witnesses for the plaintiff below, his Honor should have told the jury, in accord-

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ance with *Kincheloe v. The State*, 5 Hum., 9, 13, that "the fact that the character of a witness is assailed by a single witness casts a reproach upon it, and it then becomes a question to be decided upon by the jury, like all other questions of fact, and is to be judged of, not by the number of witnesses, but by their respectability and intelligence, consistency, and means of information; and that the character of a witness for veracity does not stand as if unimpeached, when it is assailed and sustained by an equal number of witnesses."

The jury, therefore, do, when the credit of a witness is assailed, try the question as they would try any other fact "*in the lawsuit*;" but they must try it under instructions as to the rules of evidence appropriate to the question, of which the rule cited is of great practical consequence in civil as well as criminal cases. This important rule, so necessary for the guidance of the jury, was approved by this Court, in *Whiteside v. The State*, 4 Cold., 180.

While the Circuit Judge is under no obligation to charge the jury upon abstract or irrelevant propositions, yet it is his duty, in civil as well as in criminal cases, to charge the law arising upon the facts in every case, not in remote and impalpable generalities, but as applicable to the facts, so as to aid the jury in arriving at a correct conclusion. See *Wilson v. Smith*, 5 Yer., 379; *Turbeville v. Ryan*, 1 Hum., 113. See, also, 5 Yer., 453; 2 Swan, 237; 1 Head, 209; *Ib.*, 610; 2 Head, 565.

The record in this cause shows, further, that: "The Court was asked by the defendant to charge the jury,

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that if they believed, from the evidence in the cause, that the words spoken by the defendant were spoken in heat of passion or anger, it would be a circumstance to which the jury might look, in mitigation of damages; but the Court refused so to charge, and the defendant excepted."

The conflict in the authorities upon this question is more apparent than real. It is generally conceded that, in actions of libel or slander, where the occasion and circumstances of publishing the libel or speaking the words impose upon the plaintiff the necessity of proving a dishonest or malicious intention in fact, the evidence offered to rebut it is properly admissible under the general issue. See 1 Wend. Stark. on Sl., 454; 2 Greenl. Ev., § 421. And "where the defence is, that the libel or words were published or spoken, not in the malicious sense imputed by the declaration, but in an innocent sense, or upon an occasion which warranted the publication, this matter may be given in evidence under the general issue, because it proves that the defendant is not guilty of the malicious slander charged in the declaration." 2 Saund. Pl. and Ev., 2d ed., 325.

Within this principle are embraced words lawfully spoken by counsel; matter contained in a petition to Congress or the State Legislature; or in articles of the peace; or in judicial proceedings, and the like. *Ib.*, 325; 2 Greenl., § 421; 3 Steph. N. P., 2579. And it is well said that "The defendant, under the general issue, may give in evidence any matter which tends to disprove either the speaking of the words or the publication of the libel, to bar the action or rebut the evidence of

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malice or of special damages." 3 Steph. N. P., 2579; 2 Stark. Ev., 3d ed., 638.

Applying these principles to the case at bar, no satisfactory reason is perceived for the refusal to charge the jury that, if the slanderous words were uttered in the heat of passion or anger, that fact might be looked to in mitigation of damages. The evidence was not, and in the state of the pleadings, could not have been, offered in justification. But from the proof in the record, as to the chastisement of his son by the plaintiff in error, it may be reasonably inferred that the son was a minor; and looking to all the evidence, it is manifest that the slanderous words were spoken, or are alleged by the plaintiff in error to have been spoken, in the course of an altercation with a person who, as he believed, was aiding his son to marry contrary to his wish. Now, if the father entertained the opinion that his son was about to form an injudicious or improper matrimonial engagement, or to unite himself in marriage with a woman whom he regarded as of doubtful character, and that the witness was using every effort in his power to bring about so unfortunate an alliance, was it unlawful in him—solicitous, as he doubtless was, for the welfare of his son—to remonstrate with the witness against his interference? Was it unnatural that, having heard of a scheme which he considered disastrous to his son's happiness, he should commence the conversation in an irritated mood, or that he should become irritated in the course of the altercation which immediately occurred between another son and the witness, and when the witness himself drew his knife and became infuriated? And if, in such a "storm of

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passion," he uttered language in regard to the plaintiff, which, in his cooler moments, he could not justify, why should the jury be precluded from looking to the mitigating circumstances under which he acted? If provocation, in its legal sense, will reduce a homicide, which, but for the provocation, would be murder in the first degree, to manslaughter, why may not passion and anger be considered as mitigating the atrocity of libel or slander? Few, if any, civil injuries are greater than those which result from cool, deliberate, malicious and premeditated libels; and one of the best modes of preventing such injuries, and the mortal combats too often resulting from them, is, for the juries of the country to give redress by exemplary damages. But there is a wide difference between malicious and remorseless slander, and words spoken in the heat of blood and under provocation; and we hold that a jury, in fixing the measure of damages, should be permitted to consider all the circumstances of mitigation, as well as of aggravation.

In 1 Hilliard on Torts, 3rd ed., 405, § 70, it is said: "It has been held that, in an action of slander, the defendant may show, in mitigation of damages, that he was incited and provoked to the utterance of the words, by some act or declaration of the plaintiff, contemporaneous, or nearly so, with them, if shown to have been the immediate and proximate cause or provocation. It is not sufficient, although it is necessary, to show that it occurred and was communicated to the defendant before the speaking of the words. But this may be proved by the defendant's own declaration, and the jury is to determine whether the language which the defendant used

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was used because of such provocation received from the plaintiff. So, in actions for libel, though the defendant cannot give in evidence, in mitigation of damages, a distinct and independent libel on himself, published by the plaintiff; yet, where the publication is so recent as to afford a reasonable presumption that the libel by the defendant was published under the influence of the passion excited by it, or when it is explanatory of the meaning of or occasion of writing the libel complained of, such evidence is admissible, although the libel complained of does not expressly refer and profess to be a reply to the former publication, if such reference appears on comparing the two." Various cases are cited by the author in support of these propositions, which we adopt as a correct exposition of the law.

It has been ingeniously argued for the defendants in error, that it should have been proven by plaintiff in error, that the alleged provocation immediately preceded the speaking of the slanderous words, and was occasioned by the defendant in error herself, and not by another. In answer to this, it may be observed that the authority cited does not require that the provocation should immediately precede the utterance of the words, but that the act or declaration of the plaintiff should be contemporaneous, or nearly so, with them; and, upon the facts in this case, it should have been left to the jury to determine whether the witness, to whom the words were spoken, was the agent of defendant in error, and whether the plaintiff in error had shortly before discovered the correspondence with his son, and in good faith believed that it was the purpose of the defendant in error to inveigle

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him into a marriage to which he, the father, had lawful reasons to object.

His Honor, the Circuit Judge, said, in his charge to the jury: "As to the amount of damages, this is a question for your determination, looking to all the facts and circumstances in the case;" and it has been urged, with much plausibility, that, as the jury was directed to look to all the facts and circumstances, this authorized the consideration of all matters of provocation established by the proof. This would, perhaps, have been the case but for the special request of plaintiff in error for special instructions on this subject. The refusal to give the instructions asked for was equivalent to an expression of opinion, on the part of his Honor, that if the words were spoken in heat of passion or anger, the circumstance could not be looked to in mitigation of damages.

On the trial of this cause, the plaintiff in error offered, in various forms, to prove the character as to chastity of the family in which the defendant in error resided at the time of the alleged slander, and to show that, prior to that time, she resided in the same house with her mother and sisters, and that "the general reputation and belief of the community was, that their said house was a common rendezvous, where lewd men met, and engaged in acts of adultery and fornication with the inmates of said house." But his Honor refused to allow such proof to be made; and it is insisted, for plaintiff in error, that this is ground of reversal.

"It is perfectly well settled that, under the general issue, the defendant cannot be admitted to prove the truth of the words, either in bar of the action or in mitigation

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of damages." 1 Greenl. Ev., § 424. And whatever controversy may have existed on the subject, we regard it as equally well settled, that "the defendant may impeach the plaintiff's character by general evidence, in order to reduce the amount of damages." *Ibid*, § 424.

Mr. Starkie, in his treatise on the law of slander and libel, has happily observed that: "General evidence to show that the plaintiff, previously to the alleged slander, labored under a general suspicion of having been guilty of similar practices, seems, in principle, to be admissible, as immediately and necessarily connected with the question of damages. He complains of loss of reputation, and that he has been deprived of his character by the act of the defendant. Is not the defendant, then, to be permitted to show that the plaintiff's character was previously tainted with suspicion, or that he had, in fact, little character or reputation to lose. To deny this, would be to decide that a man of the worst character was entitled to the same measure of damages with one of unsullied and unblemished reputation; a reputed thief would be placed on the same footing with the most honorable merchant—a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantum of injury sustained, a knowledge of the party's previous character is not only material, but seems to be absolutely essential." 2 Wend. Stark. on Sl., 78. But, while such is the general doctrine, it is no less a firmly established principle that particular facts, forming links in the chain of circumstantial evidence against the plaintiff, to establish the proof of the charge, can not be re-

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ceived in evidence under the general issue in mitigation of damages. *Ibid*, 90, 97.

If the plaintiff in error had pleaded a plea of justification, evidence that the defendant in error lived in a bawdy house, with knowledge of its character, would, perhaps, have been admissible to establish the truth of the plea; but without a plea of justification, such proof was clearly inadmissible. See 11 Hum., 507, 608. In *Bush v. Prosser*, 13 Barb., 221, where the slander charged the plaintiff with keeping a house of ill-fame, it was held that "evidence of unchaste and lascivious conduct of the plaintiff's family, not establishing the offense, is inadmissible for any purpose;" and we hold, in this case, that the plaintiff's action can not fail in consequence of the alleged bad reputation of her family. But, because of other errors in the record, let the judgment be reversed, and the cause remanded for a new trial.

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1. REGISTRATION. *Trust deed. Legacy.* An assignment (trust deed) of choses in action, as legacies, to secure creditors, is good against all persons, without registration. 1831, c. 90; 1839, c. 26. Code, 2030.
2. CHANCERY PLEADING. *Evidence. Notice of assignment.* An assignment of a chose in action can not be attached for want of notice to the debtor or trustee, on appeal, when no such issue is made in the pleadings.
3. LIEN OF JUDGMENT. If a levy and sale of the lands of a debtor is not

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made within twelve months after judgment, its lien is lost, and a conveyance made while the lien subsists, becomes good by relation.

FROM WILSON.

In Chancery, at Lebanon, before HENRY COOPER, J., sitting by interchange.

An anonymous brief in the record, cites Code, 2030, 2984; *Kinsey v. McDearman*, 5 Cold., 392; *Allen v. Bain*, 2 Head, 108. Insists that the interest here assigned, being an undivided interest in notes which were payable to the Clerk and Master, they were not subject to transfer of the legal ownership, either by delivery or assignment; and so it was distinguishable from the decided cases. That notice is required: *Clodfelter v. Cox*, 1 Sneed, 330, not overruled by *Mut. Ins. Co. v. Hamilton*, 5 Sneed, 277; *McLin v. Wheeler*, 5 Sneed, 687; and *Sugg v. Powell*, 1 Head, 221; the distinction being between negotiable instruments and those not negotiable.

TURNEY, J., delivered the opinion of the Court.

The decree of the Chancellor is correct.

Andrew Thompson died intestate in Wilson County, in 1860, the owner of land and slaves. Out of the land, dower was assigned to his widow. The slaves and the remainder of the land, were sold at the instance of a part of the distributees, under a decree of the County Court; the slaves on a credit of twelve months, and the land on one, two and three years. George Thompson, a son of Andrew, deceased, was entitled to one-seventh of the estate, after the allotment of dower, &c. The

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widow of Andrew is dead, and proceedings now pend for the sale of the dower. George is interested to the extent of the dower.

On the 18th of May, 1865, the Bank of Middle Tennessee recovered judgment in the Circuit Court against George Thompson, as maker, and M. L. Kelly, executrix of John Kelly, deceased, accommodation indorser, for \$799.08, and costs.

At the same time, M. L. Kelly recovered judgment by motion against George Thompson, and on the 30th of May, 1865, had a transcript of her judgment registered. On the 24th of February, 1866, execution issued from the last named judgment, and was returned 21st April unsatisfied.

On the 5th of May, 1865, George Thompson, to secure a debt due by note of \$2,334, and to indemnify him against loss, as his security for \$3,039.70, the purchase money for a tract of land bought at the sale of his father's lands, conveyed in trust to Miah Jennings his entire interest in his father, Andrew Thompson's estate.

This interest, except that in the dower, consisted of notes in the hands of the Clerk of the Court, who had made sale of the land and negroes, and of such interest as he had acquired by his purchase of the tract of land for which Jennings was his surety. This deed in trust was registered 5th September, 1865, after having been properly acknowledged before the Clerk of the County Court, on the 5th of May, 1865.

On the 21st of April, 1866, complainant filed her bill, charging that the registration of her judgment gave her

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a lien on all the equitable and legal interest of George Thompson in that county, and upon his interest in the estate of his father, Andrew; that the deed to Jennings was registered many months subsequent to the registration of her judgment, and must be postponed to the satisfaction of her debt, even if not fraudulent.

This brings us to a consideration of the question whether the interests conveyed are of a character to make necessary under our statutes the registration of the instrument conveying them.

As to the interest in the choses in action; the notes in the hands of the Clerk; that registration is unnecessary, is not an open question in this State. In the case of *Allen v. Bain*, 2 Head, 108, in construing the acts of 1831 and 1839, this Court said that, assignments of choses in action—and that would embrace legacies—was not intended by the Legislature to be included in the enumeration of instruments required to be registered. On page 107 it is written: "It has been held in this State, in one or more important cases decided some years ago, that our registry acts did not apply to assignments of choses in action." There is but little difference in the phraseology of these acts and of the Code; and we are unable to discover any difference in their meaning or evidence of an intention on the part of the Legislature to enlarge the old acts.

It has been repeatedly held in this State, that a title bond may be assigned without registration;¹ and if

¹ See *Robinson v. Williams*, 3 Head, 541; *Ocoee Bank v. Nelson*, 1 Cold., 186; *Mayer v. Fulliam*, 2 Head, 347, 350; *Allen v. Bain*, 2 Head, 100; *Fleming v. Martin*, 2 Head, 43; *Trotter v. Nelson*, 1 Swan, 7, 13; *Wood v. Chilcoat*, 1

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done in good faith, the assignment is good against all persons. This being so, a purchaser at a court sale, without a bond for title, may, for a stronger reason, transfer in good faith, such interest as he acquired under his purchase; and no registration of such transfer is required.

Registration was necessary to the dower interest; and the lien of complainant's judgment was superior to the title of Jennings, or rather an encumbrance upon it for the twelve months provided by law for its enforcement. But that time having been allowed to elapse, the lien was lost, and the deed in trust, became effectual by relation from the date of its registration.

The registration of the judgment did not change or enlarge its lien upon legal estates, the statute relied on only giving a lien upon equitable interests.

The interest of George Thompson in the dower was a legal one, and subject to execution.

It is insisted in argument, that if registration of the deed of assignment was unnecessary, that still it is void for want of notice to the debtors. This question is not made in the pleading; therefore, we can not consider it. We may remark, however, that if the question were properly raised, it could not avail under the circumstances of this case.

The Chancellor dismissed the bill. We affirm his decree.

Cold., 428; *Withers v. Pemberton*, 3 Cold., 64; *Wilburn v. Spofford*, 4 Sneed, 698, 706.

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JENNINGS v. JENNINGS.

1. HUSBAND AND WIFE. *Personalty of wife reduced to possession.* A wife permitting her personalty to go into the hands of her husband, without any stipulation as to the investment, has no claim to land purchased with the fund by the husband in his own name.
2. SAME. *Same. Infancy.* If the money is obtained by the husband by a privy examination of the wife during infancy, and she permits it to remain with the husband after she comes of age, and to be used by him, the result will be the same.
3. ADVANCEMENT. *Consideration. Note.* Where a father conveyed land to the son, for a consideration of \$1,100, expressed in the deed, of which the payment was acknowledged in the face of it, but the parties both stated the price as \$2,000, and the son executed his note for \$900 to the father, the father having declared "that he took the note, but it was only a sham; that he took his note, and wanted nothing more." Held, that the note for \$900 was intended by the father as evidence of the amount of his advancement, given to the son in the transaction.

FROM WARREN.

In Chancery at McMinnville, before BARCLAY M. TILLMAN, Ch.

J. H. SAVAGE, for complainant, cited 1 Yer., 360, 373; Meigs' Dig., § 1112; 4 Yer., 503; 5 Yer., 41; 6 Yer., 18; 1 Hum., 54; 1 Cold., 572; 3 Par. on Contr., 277, 279.

T. B. MURRAY, for defendant, cited 4 Cold., 315; 3 Sugd. on Vend., 183; *Mackreth v. Simmons*, 15 Ves., 337; 2 Sto. Eq., 580, 821; 4 Kent, 152.

NICHOLSON, C. J., delivered the opinion of the Court.

Complainants are the widow and children of Wm. Jennings, deceased; and the principal defendant, J. D.

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Jennings, is the father of Wm. Jennings. The controversy involves the title to a tract of land of 206 acres, conveyed by J. D. Jennings to his son, Wm. Jennings, in 1861. The conveyance purported to be for the consideration of \$1,100, in hand paid. It was executed and delivered, but was afterwards lost, and has never been registered.

Complainants claim that the land was paid for with the separate money of Julia Jennings, then wife of Wm. Jennings, and that she is the equitable owner, or, at least, that she has a right to pursue her money, which was used in paying for the land, and that her lien is prior to all other claims. Defendant, J. D. Jennings, insists that he holds Wm. Jennings' note for \$900, and a claim of about \$300, paid for him as accommodation indorser on a note for that amount; and that both of the notes were given for the land. He claims to have the vendor's lien, and that this is superior to any claim of complainants.

It appears from the proof, that Julia Jennings, now Julia Templeton, was married to Wm. Jennings in 1857. At the time of her marriage, she was about eighteen years of age, and was entitled to a distributive share in the estate of Audley Harrison, amounting to nearly \$1,100. This fund was in the hands of the Clerk and Master of the Chancery Court at McMinnville. Soon after the marriage, Wm. Jennings received from the Clerk a portion of this fund, and executed his receipt for it. Not long afterwards, in 1857, he borrowed a still larger portion from the Clerk, and executed his notes therefor, with his father, J. D. Jennings, as his surety. These notes

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are still in the hands of the Clerk and Master. In 1858, Wm. Jennings applied to the Court for an order to be made on the Clerk, directing him to pay the fund to him. The Court made the order, after privily examining the wife of Wm. Jennings, and learning from her that she wanted the money paid over to her husband. The residue in the Clerk's hands was then paid to the husband, and his receipt in full taken.

Nothing appears, in the order or in the proof, indicating that it was made known to the Court that the wife was a minor when she was examined, or when the order was made. She does not allege that any misrepresentation was made by her husband, upon the subject of her age; nor is there any proof going to show that he made any such misrepresentation, or that he exercised any undue influence in procuring her assent to the order. The proof makes it reasonably certain, that he used the money for several years in trade, and that the deed for the land was not taken until about three or four years after the money was received from the Clerk. During this period, there is no evidence of any dissatisfaction or complaint, on her part, as to the use he was making of the money; nor is there any evidence, satisfying us that there was any agreement or undertaking, on his part, to invest the money in any special manner.

Under this state of facts, we hold that the husband took the money as his own, by virtue of his marital right, which attached to it on his marriage, and which right became absolute, so soon as it was received under the order of the Court. It is true, that the wife had a right to have a reasonable portion of the fund settled on her, if

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she had elected so to do. It is also true, that if the Court had been informed that the wife was a minor, it would have been contrary to the practice in such cases, to receive the assent of the wife as sufficient ground for ordering the money to be paid over. But as there is no allegation or proof of any fraud, or undue influence, in procuring the order, and as the wife seems to have acquiesced in the receipt and appropriation of the money, after she became of full age, and, as far as we can see, down to the filing of the bill, in 1865, we feel fully authorized to hold that the husband received the money divested of any trust. *Wilkes v. Fitzpatrick*, 1 Hum., 54; 1 Lead. Cas. Eq., 382.

The next question presented, is, whether the defendant, J. D. Jennings, is entitled to have the land subjected to sale, to satisfy his alleged vendor's lien? We should be embarrassed in reconciling the apparently conflicting testimony on this question, but for the evidence of the draftsman of the deed, and of the \$900 note. This witness does not recollect the consideration expressed in the deed; but other witnesses, who saw and read it, make it certain that the consideration expressed was \$1,100, in hand paid. The draftsman says that he not only drew the deed, but, at the same time, a note. He does not remember the amount of the note, but he recognizes the \$900 note as in his handwriting. He says, that, when J. D. Jennings executed the deed and note, he remarked that he made a warrantee deed to his son, and that he took his note, but that was only a sham; that he intended the land for his son, and that he took his note, and he wanted nothing more. There is proof, by other witnesses,

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that the father and son both spoke of the price of the land as being \$2,000; and there are still other witnesses, who prove that J. D. Jennings gave \$800 or \$900 for the land, and that he was to let his son have it at what it cost him, probably requiring interest to be added. The preponderance of the proof is, that the land was worth about \$2,000. We think the evidence of the draftsman of the deed and note reconciles this apparently conflicting testimony. The nominal price of the land was \$2,000; the son had paid \$1,100; the land was intended for the son; his note for \$900 was taken as a sham—that is, as we interpret the transaction, he wanted the note of his son for \$900, as evidence of the amount of advancement in the land that he intended for him; he wanted nothing more than his note. It is clear, that the proof of the draftsman of the papers is wholly irreconcilable with any claim retained for his vendor's lien, either for the \$900 or the \$300 note. The retention of any such lien is clearly repelled by the evidence of this witness.

Our conclusion is, that the \$1,100, expressed in the deed, was the real amount which the father intended to charge the son for the land, and that the residue was intended as an advancement. As the proof is satisfactory that the \$1,100 was paid, we hold that Wm. Jennings died the absolute owner of the land, free from any incumbrance for unpaid purchase money; and that, upon his death, it descended to his children, subject to the dower of his widow.

The decree of the Chancellor is reversed; the lost deed

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for the land set up; the title divested out of J. D. Jennings, and vested in the heirs of Wm. Jennings, subject to the widow's dower; the note in the hands of the Clerk and Master, for the money borrowed by Wm. Jennings, with J. D. Jennings, as surety, will be cancelled; and the cause remanded for the assignment of dower, and such other proceedings as may be necessary.

The costs of the Court below already accrued, and the costs of this Court, will be paid by J. D. Jennings; the costs that may hereafter accrue in the Court below, will be disposed of by the Chancellor.

WM. KEELE v. SALLY CUNNINGHAM.

1. TENANTS IN COMMON. *Re-purchase of joint estate. When not in trust.* One of several tenants in common, after the sale of the common estate for taxes, and the expiration of the time for redemption, being allowed to buy or redeem, the purchaser declaring that no one else should be allowed to redeem, and having arranged with him and obtained his deed, she then agreed that any one who would raise the money should have half of the land. The guardian of infant co-tenants undertook to raise the money, but failed to raise anything, and it was paid otherwise; there being no other understanding that the co-tenant should take for any one but herself; it was held that the co-tenants could not require her to share with them the right which she had obtained.
2. EVIDENCE. *Declarations of deceased guardian.* The declarations of a deceased guardian as to a transaction, not made as part of the *res gestæ*, are not admissible to establish a right in his wards.
3. CHANCERY PLEADING. *Answer as cross bill.* An answer filed as a cross

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bill, must be accompanied by a bond for costs, or by issue of process to become operative as a cross bill.

Case cited: *Clark v. Cantwell*, 3 Head, 202.

FROM COFFEE.

In the Chancery Court at Manchester, before B. M. TILLMAN, Ch.

— ISBELL, for complainant, insisted that the declarations of the guardian were competent, because he was dead, and the declarations were against his interest, citing 1 Greenl. Ev., § 147 to 150. On Trusts, from payment of purchase money, he cited Sto. Eq. Jur., § 1201; Hill on Trust., 96, 97; *Dudley v. Bosworth*, 10 Hum., 9. On the obligation of tenants in common, *Tisdale v. Tisdale*, 2 Sneed, 596.

C. A. SHEAFE cited and commented on *Clark v. Cantwell*, 3 Head, 203; *McCammon v. Pettitt*, 3 Sneed, 242, and *Holder v. Nunnelly*, 2 Cold., 288.

NICHOLSON, C. J., delivered the opinion of the Court.

Complainant alleges that he is the owner, by purchase, of two shares in a tract of land, of 135 acres, in Coffee county, of which James Cunningham died seised, several years ago. He states, that, shortly after the death of Cunningham, the land was sold for taxes, and bought by one Frazier; and that after the time of redemption had expired, he conveyed the land to Sally Cunningham, one of the heirs of James Cunningham, deceased, for the consideration of \$100. He charges that the guardian of two of Cunningham's minor heirs redeemed the land from

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Frazier, for the benefit of all the heirs; and that the guardian paid for the land out of money in his hands belonging to his wards, but that the deed was drawn to Sally Cunningham alone. He prays that the redemption be declared for the benefit of all the heirs, and that the land be sold for partition.

Sally Cunningham answers, and admits that Frazier executed to her a deed for the land, as charged; but she denies that the guardian of two of the minor heirs redeemed the land from Frazier, for the benefit of his wards, or for any purpose; or that he advanced or paid to Frazier the \$100, or any part thereof; or that the money belonged to the guardian or his wards; but she avers that the money was paid by one Webster, by her order, and for her exclusive benefit, and she thereby became the owner in fee, of the land. She then charges that one McDowell is in possession of part of the land as tenant of complainant; and she prays that her answer be filed as a cross bill, and that the possession of that part be restored. But no bond for costs is given for the prosecution of the cross bill, nor was any process issued thereon. The answer being sworn to, and being responsive to the allegations of the bill, it must be taken as true, unless the proof overturns it.

The evidence mainly relied on to sustain the allegations of the bill, and to rebut the denials of the answer, consists of declarations made by the guardian, who is dead; but as these declarations were neither made when the money was paid to Frazier, nor when Frazier made the deed to Sally Cunningham, nor in her presence, they are wholly incompetent.

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The only other evidence tending to sustain the bill, is that of Webster. He says Frazier told him he would make a deed to Sally Cunningham, if she would pay him \$100, and he would make it to no one else. He communicated this to complainant, and advised him to raise the money, and let the deed be made to Sally, but he refused. Witness says, he then told Sally what Frazier said, and she was willing to take the conveyance if she had the money, and she was willing to deed half the land to any one who would furnish her the money. Witness then told the guardian what Sally said, and the guardian agreed to furnish the money, but did not have it. Witness then procured the money from his nephew, and paid it to Frazier, who thereupon made the deed to Sally. The guardian had never repaid the \$100 to witness' nephew, but witness had agreed to let his nephew board it out with him. It was witnesses' understanding that the guardian was acting in the matter as guardian, but he fails to prove that Sally was taking the conveyance in any other way than for her own benefit, nor does he show that the guardian did anything in the matter, nor does the proof show that she was redeeming the land. The time for redemption had expired; the land was the absolute property of Frazier, if the tax sale was valid. There is no proof showing that she purchased in any other way than for her own benefit, nor did Frazier sell and convey in any other way. Sally, therefore, could legally purchase for her own benefit, and the other heirs had no right to hold her responsible as a trustee. 3 Head, 202.

It is manifest that the proof fails to overcome the evi-

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dence furnished by the answer, and hence, that the bill must be dismissed. The Chancellor so held, and to that extent we affirm his decree. But he gave the defendant relief on her cross bill. This was erroneous. As there was no bond for costs, and no process issued, the answer could not be entertained as a cross bill. The bill and cross bill will, therefore, be both dismissed; and the costs of this court, and of the court below, will be paid by complainant.

Mr. Isbell filed a petition for re-hearing, in which he asked that the Court would dismiss the bill without prejudice, because the testimony of Webster could now be contradicted by Duke Webster, his nephew, who was absent in California when the deposition of the witness, Webster, was taken; and that he would prove that he loaned the money to McFaddin, the guardian, and not to the witness, Webster; that the complainant could also prove, by a recently discovered witness, admissions of defendant that the redemption was made for all the heirs; that the tax sale was void, for insufficiency of description; and that, as to part of the land, the complainant had been in actual possession of it for many years, holding it adversely to all others, and was so holding at the time of defendant's purchase.

BY THE COURT:

The petition does not make out a case for dismissing the bill without prejudice. If the new evidence was before us in a shape to be noticed by us, there is no sufficient reason why it was not produced on the trial. The decree will stand.

F. D. Smith *et als.* v. John W. Price.

F. D. SMITH *et als.* v. JOHN W. PRICE.

1. USURY. *Discount.* The exchange, for a judgment, of notes at a rate of discount greater than six per cent. per annum, is not usurious, unless made colorably, to evade the usury laws.
2. SAME. *Consideration.* A note for \$217, and \$83 in cash, over and above the amount of a judgment, in addition to other notes indorsed to the full amount of the judgment, being given in satisfaction of the judgment, held to be for a valid consideration, and not usurious.

Case cited and discussed: *Campbell v. Read*, M. & Y. 932.

FROM WILSON.

In Chancery at Lebanon, before JOHN P. STEELE, Ch.

The complainant being indebted to the defendant, by judgment, in about \$1,500, indorsed notes to the amount of the judgment, and gave in addition, \$83 in cash, and \$217 in his own note, in satisfaction of the judgment. Bill to set aside note for usury.

JOHN W. HEAD & SON, for complainants, cited: *Parham v. Pulliam*, 5 Cold., 501; 3 Par. on Contr., title Usury; 9 Peters, 378; 5 Hum., 409; 2 Cold., 424; *Morgan v. Schermerhorn*, 1 Paige, 544; *Colton v. Denham*, 2 Paige, 267; *Williams v. Hance*, 7 Paige, 581; *Ib.*, 615; *Crippen v. Heenance*, 9 Paige, 211; *Ib.*, 483; 2 Cold., 421; *Watkins v. Taylor*, 2 Munf., 234; 6 Id., 472; 2 Rand., 109; 1 Rich. Ch., 41; *Rowland v. Bull*, 5 B. Monroe, 146; *Toole v. Stephen*, 4 Leigh, 581; *Ely v. McClung*, 4 Porter, 128.

JORDAN STOKES & SON, for defendants, cited *Turney v. State Bank*, 5 Hum., 408.

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TURNER, with them, cited 5 Hum., 508; 2 Par. Contr., 384; *Doak v. Snapp*, 1 Cold., 183; *Day v. Dunham*, 2 Johns. Ch. 192; *Ketchum v. Booker*, 4 Hill, 224; *Holt v. Clark*, 4 Conn., 156; 11 Ib., 487; 8 Ib., 573; 21 Wend., 103; 24 Wend, 230; *Oldham v. Turner*, 3 B. Monroe, 67; *Young v. Muller*, 7 B. Monroe, 341; *Shackelford v. Morris*, 1 J. J. Marsh. 494.

FREEMAN, J., delivered the opinion of the Court.

This is a bill filed by F. D. Smith, for himself and G. K. Smith, by said F. D. Smith, as his next friend, to have a note for \$217 declared void, and cancelled, for usury, or having been given without consideration; and also, to have paid back to complainants the sum of \$83, alleged to have been paid as usurious interest.

The facts of the case on which the judgment of the court rests are, that in 185—, Price, and one Simpson, sold to Wm. J. Smith, mules for \$1,500, and took his note for them, with G. K. Smith as surety. When the note fell due it was sued on, and judgment recovered in the Circuit Court of Wilson County, June Term, 1860, and appeal taken to the Supreme Court, where the judgment was affirmed at the next Term of that Court. T. C. Word and E. Smith were the securities for the appeal to this Court.

The interest of Simpson in this judgment, after its recovery, was transferred to one John Kelly, who is since dead, and whose representative is a defendant.

It appears, that after the judgment in this case in the Supreme Court, Wm. J. Smith, the principal in the note, sold his land and moved off, and left the notes of Messrs.

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Quarles, given for his land, in the hands of F. D. Smith, to pay off the judgment. These notes were, it seems, due at various intervals, up to October 1st, 1862.

The proof shows, that when the execution on the judgment was issued, and the money about to be made under it, out of G. K. Smith, the surety, the Smiths sent witness Harris, to see Price and Kelly, to make an arrangement to pay the debt in notes, and offered these notes on Quarles in payment of the judgment. The owners of the judgment seemed unwilling to take the notes, preferring the money; and, as they say in their answer, felt the uncertainty of the times, the war having commenced. The money could then be made, and they were in no condition to give time to the parties in said judgment. After some negotiation, it was ultimately agreed, that if the Messrs. Quarles would give new notes in lieu of the land notes, payable to one of the Smiths, and he would endorse the notes to Price and Kelly, and pay \$300 difference between the amount of the judgments and the said notes, the judgment should be satisfied. For this difference, the \$217 note was given, and the \$83 in money paid, and thereupon the execution was satisfied.

It is very earnestly insisted, that this amount of \$300 was usurious; and if not so, the note was without consideration, having been given by G. K. Smith, the surety in the original note, and F. D. Smith.

We cannot assent to the proposition, that this note was of itself usurious. "Interest is the compensation which may be demanded by the lender from the borrower, or the creditor from the debtor, for the use of money:" Code, § 1943.

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By section 1944, "the amount of said compensation shall be at the rate of six dollars for the use of one hundred dollars for one year; every excess over that rate is usury."

The note in this case was not given for the loan of money, nor was it compensation to the creditor from the debtor, for the use of money, nor is it for forbearance in the collection of his debt, but was a *bona fide* transaction, a simple mode of payment of a debt reduced to a judgment. The debt itself was satisfied and extinguished by the payment of the notes of the Messrs. Quarles; the parties fairly agreed upon and fixed the value of the notes, which were given and received in discharge of the judgment; and we can not say from the facts and circumstances of the case, that the bargain was even a hard or unreasonable one, when we take into consideration the matters stated in the answer and the proof, as entering into and making up the elements that fairly might have been considered by the parties, affecting the value of the securities thus taken.

The notes had considerable time to run; an attorney's fee might be fairly calculated upon, to be paid for their collection, and delay as the result of collection by law.

In addition to this, the party had the security and lien of his Supreme Court judgment, against the parties to the note, and the sureties for the appeal; both of which were given up for the simple notes, and indorsements on them. We can see no device to evade the usury laws in this transaction, nor violation of their letter or spirit.

The case of *Campbell v. Read*, Martin and Yer. R., 392, would seem at first blush to militate against this view, but on examination of the opinion of the Court in that

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case, it will be seen that the jury found as a fact, "that the intention of the indorsement, (the contract sought to be avoided,) was to obtain an exorbitant interest, on the part of the lender, and to evade the statute against usury." p. 393.

No such intention appears in this case; and we think the Supreme Court of Kentucky have laid down the proper rule: "That the purchase of a note at a rate of discount exceeding six per cent. per annum, is not usurious; and the receipt of such note in payment of a pre-existing debt, stands on the same footing," no intention to evade the usury laws being shown, or purposed by the parties. *Oldham v. Turner*, 3 B. Monroe R., 68.

As to the question that there was no consideration for the note of \$217, we need only say, that the satisfaction of the Supreme Court judgment, and the extinguishment of its statutory lien, and the loss of the liability of the sureties on the bond for appeal in that case, were ample consideration to support the contract to pay, agreed upon in said note.

The Chancellor held this note to be usurious, and ordered it to be cancelled, but refused to decree in favor of complainants as to the \$83. We reverse the decree of his Honor as to the note, and affirm it as to the \$83; and direct that complainants bill be dismissed, and that they pay the costs of the Court below, and of this Court.

Jemima Grimes v. J. W. Orrand.

JEMIMA GRIMES v. J. W. ORRAND.

1. DEED. *To a person living.* A deed conveying land, *in presenti*, to the heirs of a person living, vests the title in the children, then *in esse*, of that person; afterborn children do not take.
2. DESCENT. *Afterborn brothers and sisters.* Afterborn brothers and sisters, unless "born within the period fixed by law," do not take an interest in the estate of a deceased brother.¹

Case cited and reviewed: *Read v. Fite*, 8 Hum., 328.

FROM CANNON.

In Chancery at Woodbury, before BARCLAY M. TILLMAN, Ch.

JNO. W. BURTON, for complainant, cited: Broom's Legal Maxims, 238, 395; *Read v. Fite*, 8 Hum., 328; *Stowe v. Ward*, 3 Hawks., Law and Eq., 604; *Huss v. Stephens*, 51 Penn. St. R., 282; 2 Cold., 136.

ST. JOHN, and — FINLEY with him, as to the second deed, cited: *Shields v. Mitchell*, 10 Yer., 1; *Farrer v. Bridges*, 5 Hum., 411; *Morgan v. Elam*, 4 Yer., 413.

CHARLES READY, FARE & MCKNIGHT, for defendants. JAS. S. BARTON, with them, cited: Bacon's Abr., (by Bouvier,) 512, title Grant, C. and note; Perk., § 56; 1 Pick., 30; *Finley v. Humble*, 1 Marsh., 293; Vaughn, 199; 4 Cruise, 218; *Shaw v. Lord*, 12 Mass., 447; *Hall v. Leonard*, 1 Pick., 514; *Davis v. Hayden*, 9 Mass., 514; *Boon v.*

¹See *Baker v. Heiskell*, 1 Cold., 643. *Contra.*

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Moore, 14 Mis., 420; *Kitchen v. Craig*, 1 Bar., 119; 1 Pirt. Dig., 255; 2 Hil. Real Prop., (3rd ed.,) p. 351, c. 84, § 19; 1 Sneed, 554; Bouv. L. Dic., title Heir.

FREEMAN, J., delivered the opinion of the Court.

This bill is filed to assert a title to 52 acres of land, conveyed by William Grimes, the grandfather of complainant, by deed dated 14th August, 1845, to the "heirs of Britton Grimes; the said Britton being at the time living, and as the bill alleges, a drunken spendthrift.

The deed is entitled "a deed of gift," and conveys the land to the heirs of Britton Grimes, in consideration of love and affection. At the time of this conveyance, the said Britton had but one child born, to-wit: the complainant, Jemima; but another was born, perhaps within three weeks of the making of said deed, who only lived a few minutes after its birth. Since the death of said last mentioned child, there have been born to Britton Grimes, perhaps seven other children, parties to this bill. The deed of William Grimes was acknowledged before the Clerk of the County Court, by William Grimes, on 1st day of October, 1845, and was duly noted, as filed by the Register, at 12 o'clock A. M., "and registered the same day."

Britton Grimes was put in possession of the land, and continued to occupy it for near two years after the making the deed aforesaid, when the said William and Britton conveyed the land to T. B. Smith, who, on 28th of May, 1852, conveyed to Stanford Smith, who conveyed to Brevard, and he to Tatum, and Tatum conveyed on 4th of September, 1856, to the defendant, Orrand, who

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now holds the same; and the contest is between the various vendees of the land, and the children of Britton Grimes.

The case turns on the construction of, and effect to be given to, the deed of gift above recited.

It perhaps ought to be stated, that there is on the same paper as the deed of gift, below the body of the deed, the following instrument:

“P. S.—I wish it expressly understood, that the above tract of land is all the interest that the said Britton Grimes is to have, both real and personal, and that he is to have no further claim as a legatee to any of my estate after my decease. This, 1st day of October, A. D., 1845.

“Teste: R. FOWLER.”

WM. GRIMES.”

This is acknowledged before the Clerk of the County Court, as appears by his certificate that the said Wm. Grimes “acknowledges that he executed both of the within instruments for the purposes therein contained.”

What then, is the effect of the above deed of gift to the heirs of Britton Grimes, he being then living, and known to be so by his father, who placed him in possession of the land, and afterwards joined with him in the sale and conveyance of it?

We have had much difficulty in arriving at a satisfactory conclusion on this question. There is a large and most respectable class of authorities, that hold distinctly, that a conveyance by deed to the heirs of a man living at the time, is absolutely void for uncertainty, and for want of a definite grantee to take. These decisions and authorities are mainly based on the common law maxim that no one

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could be heir to the living; and if we are to take the word "heirs" in its technical signification, this rule would be conclusive against the complainant in this case. See *Hall v. Leonard*, 1 Pick., 27.

But is this the sense in which the word "heirs" is used in the deed, or are we warranted by authority and sound principle to construe the word "heirs" to mean children? If so, the case is comparatively free of difficulty.

In the case *Read et als. v. Fite*, 8 Hum., 328, the deed was executed to John C. McLemore, "in trust for the use and benefit of the joint heirs of Thomas J. Read and Frances L. Read," both being alive at the time, "as well the present as any future heirs," "it being the express intent and meaning of this indenture, that the said McLemore is to hold said property, as trustee, for the use and benefit of said heirs, and for no other use and purpose whatever." The Court say: "The provision in favor of 'the present,' as well as 'any future heirs,' etc., proves beyond question, that the word heirs is not employed in its technical sense, but means children." Technically, persons in life can have no heirs; therefore, the word "heirs" is not employed in its technical sense when coupled with the word "present," but is used to mean *children*.

The Supreme Court of Pennsylvania have held the same doctrine substantially; criticising, and refusing to follow the case of *Hall v. Leonard*, above referred to in Pick. R., on the ground that the rule quoted from Perkins, s. 52, referred to, and on which that case rested, "was predicated of incorporeal interests, which only lie in grant, and are

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not susceptible of livery of seisin, and do not apply where registration stands instead of livery."

The modern principle is, as to deeds as well as wills, "the intent of the grantor, when legal, is a governing principle in the construction of his deed." See 3 S. & W., 303; *Hollingsworth v. Fry*, 4 Dallas, 347.

We hold, that the principles above cited, authorize us to pronounce on the facts of this case, that the word "heirs" is not here used in its technical sense, but that it means children, and was so used by William Grimes.

The deed took effect at once, was a present gift, and is as evidently on its face, a conveyance of the legal title to parties then living, and those parties, the children of Britton Grimes, under the designation of "his heirs," as if the word *present* had been annexed to the gift. Such intention being so clearly and definitely expressed, we feel authorized to effectuate this gift, and carry out the clearly expressed purpose of the grandfather.

The gift on the face of the deed, being a gift *inter vivos*, and having no reference to the future, was intended to go into immediate effect; and Jemima Grimes, and perhaps the unborn child, being the only persons in being who could take, we hold that the whole estate belongs to the said Jemima, and that she is entitled to have a decree for the same: 2 Cold., 136. We need not decide upon the question, whether the unborn child took under the deed, as the result would be the same. Jemima, the sister being the heir of such child, would in either case, now be entitled to the whole estate, as no other child of Britton is shown to have been born within the period al-

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lowed by law for taking the estate by descent from such child.

We do not go into an elaborate statement of the numerous authorities presented by counsel for defendants, nor pretend to review them. Suffice it to say, we have carefully examined them, and announce our conclusion as to the true principle governing the case, as above stated.

The question presented of innocent purchaser for valuable consideration, need not be discussed, as the defense was not made in the answer with the fullness required by our adjudications, and is not fairly raised in the record.

We need not refer to the other questions presented in argument by the learned counsel, further than to say, that they have been examined, and the discussion of them could not change the result.

The decree of the Chancellor will be modified in accordance with this opinion, and a decree entered in favor of Jemima Grimes for the land in controversy, with directions for a proper account to be taken of rents and profits, and the value of such permanent improvements as have enhanced the value of the land, etc.

The case will be remanded for such account; and to be further proceeded in; the defendants, and their sureties for the appeal, will pay the costs in this Court.

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J. P. COFFEE v. J. H. NEELY.

1. RECORD FROM ANOTHER STATE. *How certified. Seal.* A record certified under the Clerk's seal of office; if that be not the seal of the Court, and so not in compliance with the act of Congress; is well authenticated, under the Code, 3795.
2. SAME. *Same.* A certificate of a Clerk, that the foregoing contains a true and perfect transcript of certain enumerated papers, (which usually constitute a perfect record,) "as the same remain now on file and of record" in his office, with the certificate of the Judge, that his certificate is in due form of law, is a sufficient authentication of the record.
3. ERROR. *Nul tiel record.* It is error to submit an issue of *nul tiel record* to a jury; but if they find as the Court would have found, it is not a material error, for which this Court will reverse.
4. PLEADING. *Practice. Demurrer sustained erroneously to a good plea which is untrue, no error.* Though a plea that the Court of another State had no jurisdiction is a good plea, and it is error to sustain a demurrer thereto, yet, if it appears from the record that the Court did have jurisdiction, this Court will not, for such error, reverse a judgment based upon the judgment. Code, 4516.
5. JUDICIAL KNOWLEDGE. *Of laws and statutes of other States.* The Courts of Tennessee will, under the Code, 3800, 3801, take judicial notice of the modes of proceedings in Kentucky, as shown in Stanton's Code of Practice, it having been adopted by statute as authentic.
6. SAME. *Same.* The same rule would be adopted, independent of the Code.
7. AUTHORITY. The principles announced in a case are to be limited and restricted by the facts appearing in the case in judgment.
8. JUDGMENT. *Of another State. Attacked at law for fraud.* A judgment of another State may be attacked in this State, at law, by plea, showing that it was obtained by fraud.
9. PLEA OF FRAUD. *What is.* A plea that owing to political prejudices, the plaintiff could not attend to his defense in Kentucky without endangering his life, and that the plaintiff fraudulently combined with the citizens of Kentucky, by force and threats, to keep him from making his defense, and took judgment by default, well knowing that defendant did not owe him one cent, but that he owed defendant, is a good plea to a Kentucky judgment.

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Cases cited: *Burton v. Pettibone*, 5 Yer., 443; *Foster v. Taylor*, 2 Tenn., 191; Coop. ed., 578; *Topp v. Bank of Alabama*, 2 Swan, 184; 1 Coop. Overt., 212; *Glasgow v. Lowther*, Cooke, Coop. ed., 351; *Winchester v. Evans*, *Ib.*, 320; 3 Hay, Coop. ed., 211; *Moren v. Killibrew*, 2 Yer., 376; *Earthman v. Jones*, *Ib.*, 484; *Bank v. Patterson*, 8 Hum., 368; *Williams v. Tenpenny*, 11 Hum., 179; 2 Yer., 258; 2 Swan, 555.

Code cited: 3795, 3800, 3801, 4516, 2746, 2747, 2884.

FROM OVERTON.

In the Circuit Court. Judgment before W. W. GOODPASTURE, J. The record does not show what Judge acted upon the demurrers.

JOHN P. MURRAY and E. L. GARDENHIRE, for plaintiff in error, cited Sto. Conf. of Laws, §§ 584, 586, 609, 609, a; 8 Johns. R., 173; 2 Barb., 602; 5 Georgia, 274; 4 Metc., 333; *Foster v. Taylor*, 2 Tenn., 191.

J. D. GOODPASTURE, for defendant, cited *Foster v. Taylor*, 2 Tenn., 191.

NELSON, J., delivered the opinion of the Court.

Neely brought this action of debt against Coffee, in the Circuit Court of Overton county, upon a judgment for fifteen hundred dollars, recovered against defendant in the Circuit Court of Cumberland county, State of Kentucky, at the October Term thereof, 1865, and here to the Court shown. The defendant pleaded *nul tiel record*; fraud in obtaining the judgment; no jurisdiction in the Circuit Court of Cumberland county of the subject matter of the suit; no jurisdiction in said Court of defendant's person

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and set-off. Issue was taken upon the plea of *nul tiel record*, and special demurrers filed to the other four pleas. The demurrers were sustained as to the second, third and fourth pleas, but overruled as to the fifth; and thereupon a replication was filed, and issue taken upon the fifth plea, and the case was submitted to the jury on the issues joined upon the plea, which improperly concluded to the country, and upon the plea of *nul tiel record*, and set-off. The jury found the issue in favor of the plaintiff, and judgment was rendered against the defendant, Coffee, for \$1,418.74, and costs, from which he prosecutes this appeal.

The record does not show, with certainty, what disposition was made of the plea of *nul tiel record*. It should have been tried by the Court, but no direct action appears to have been taken upon it, except to grant leave to file a replication thereto. The issue seems to have been submitted to the jury, and this was error. See 2 Yer., 258; 2 Swan, 555.


On the trial in the Court below, the plaintiff read in evidence a paper, styled "A transcript of record from the Circuit Court of Cumberland," to the reading of which defendant excepted, because, as he alleges, it was not, for various reasons, properly authenticated. The certificates upon said paper are as follows:

"STATE OF KENTUCKY,
"CLERK'S OFFICE CUMBERLAND CIRCUIT COURT. }

"I, C. P. Gray, Clerk of the Cumberland Circuit Court, certify that the foregoing six pages and nine lines contain a true and perfect transcript of the petition, notes, summons, Sheriff's return thereon, judgment and *fi. fa.*

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that issued thereon, with Sheriff's return thereon, as the same remains now on file and of record in my office.

 In testimony whereof, I have hereunto set my hand, and affixed my seal of office, at office in Burksville, 11th day of January, 1866.

"C. P. GRAY, Clerk."

"STATE OF KENTUCKY,
"CUMBERLAND CIRCUIT COURT. }

"I, T. L. Alexander, Judge of the 15th Judicial District, in the State of Kentucky, and presiding Judge of the Cumberland Circuit Court, do certify that C. P. Gray, whose genuine signature appears to the foregoing certificate as Clerk, is now, and was at the time of signing the same, Clerk of the Cumberland Circuit Court, duly qualified according to law; that his certificate is in due form of law, and all his official acts as such are entitled to full faith and credit. In witness whereof, I have hereunto set my hand as Judge aforesaid. This, the 11th day of January, 1866. T. L. ALEXANDER, J. C. C."

It is contended for the plaintiff in error, that the Clerk's certificate is not sufficient, because, it is said, he does not purport to certify the copy of a record, but only copies of certain papers in a cause; and it is further alleged that the record is not certified under the official seal of the Court, and that the Judge does not certify that there is no public seal of office in his court. Neither of these positions is correct.

1. The act of Congress of May 26, 1790, prescribing the mode of authenticating legislative acts and judicial records and proceedings, does not, in express terms, re-

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quire the Clerk to certify that the transcript is a copy of the record. The phrase, "judicial records and proceedings," was intended to embrace the summons, declaration or petition, and other proceedings in a cause, as well as the actual proceedings in open court, entered upon the minutes or record book, all of which constitute, in law, the record of a cause; and the language employed by the Clerk in his certificate, that the paper is a true and perfect transcript of the petition, notes, summons, etc., as the same remain *now on file and of record* in my office, was appropriately used to convey the idea that he not only transcribed what appeared upon the minutes, but all the papers filed in and properly belonging to the cause; and it could not be as he certifies it is, *a true and perfect transcript*, unless it embraced every paper properly filed, and every entry made of record in the cause.

In *Peck v. Gale*, 3 Mil. La. R., 320, 323 and 324, it was held that a certificate of the Clerk that the transcript contains *the proceedings on file and of record*, is presumptive evidence that it contains the *whole* proceedings; and, therefore, a transcript, thus authenticated, may be read. See 3 Cow. & Hill's Phil. on Ev., 2d ed., 1059. In Pennsylvania, a certificate from the prothonotary, annexed to the exemplification of a record, that the paper is *truly copied from the records*, imports that it is a copy of the whole, and not a mere extract; and that the words, "a true copy," import an entire copy. *Edmiston v. Scharwtz*, 13 Serg. & Rawle, 135; 3 Cow. & Hill's Phil., 1059, 60. These cases are almost identical in principle with this, and are not in conflict with *Burton v. Pettibone*, 5 Yer., 443. There it was held, that "to certify

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that the papers were copied from the record on file, is not certifying that the same is a full and perfect transcript of the proceedings in a cause." But here the Clerk enumerates all the papers usually constituting a record, and certifies that it is a true and perfect transcript, and the Judge certifies that his certificate is in due form of law.

2. It seems to be generally agreed that the method of authentication prescribed by the act of Congress is not exclusive of any other which the States may see proper to adopt. See 1 Greenl. Ev., 2d ed., 505, and the cases cited in note to 1 Bright. Dig., 265. Several of the States have legislated upon the subject. 3 Cow. & Hill's Phil. Ev., 2d ed., 1060. Among others, the Code of Tennessee, 3795, contains a provision as to the mode of authentication. The act of Congress provides that the authentication shall be by "the attestation of the Clerk and the *seal of the Court*, if there be a seal," etc.; and the objection here is, that the Clerk does not purport to affix the *seal of the Court*, but only his *seal of office*. Admitting that there *may* be a distinction between the seal of the Court and the seal of the Clerk, as a mere officer of the Court, and that there is some plausibility in the argument that the Clerk does not, in the exact language of the act of Congress, purport to affix the seal of the Court *eo nomine*, we hold that the provision in the Code, 3795, contains a literal answer to the objection, and embraces precisely such certificates as those now under consideration. The words of that section are, that: "A judicial record of a sister State, or of any of the Federal Courts of the United States, may be proved by a copy thereof, attested

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by the Clerk, *under his seal of office*, if he have one, together with a certificate of a Judge, Chief Justice, or presiding magistrate, that the attestation is in due form."

The objection, therefore, stated in the bill of exceptions, that the Judge does not certify that there is no public seal of office in his court, if it were tenable under the act of Congress, is expressly obviated by the provision in the Code as to the Clerk's seal of office; and, according to *Foster v. Taylor*, 1 Cooper's Overt., 568, foot; 2 Tenn., 191, it is immaterial to which certificate the seal stands in juxtaposition; the Court will consider it as annexed to the proper certificate.

3. It is next insisted that the Circuit Court erred in sustaining the demurrers to the pleas which sought to put in issue the jurisdiction of the Circuit Court of Cumberland county, Kentucky, both as to the subject matter in litigation, and the person of the plaintiff in error.

In Story's Conf., § 609, the author, in treating of the constitutional provision, that "full faith and credit shall be given in each State, to the public acts, records and judicial proceedings of every other State," declares that this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered, to pronounce the judgment; nor an inquiry into the right of the State to exercise authority over the parties or the subject matter; nor an inquiry whether the judgment was founded in, and impeachable for, a manifest fraud. And Chancellor Kent, in a note to his Commentaries, vol. 1, p. 261, m., 6th ed., cites a large number of authorities to establish the positions pervading, as he says, the jurisprudence of this and all other coun-

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tries, not only that the court of the State in which the judgment was rendered must have had jurisdiction of the subject matter, but that the defendant must have had due notice to appear; or, if a foreigner or non-resident, must have actually appeared to the suit, "or the judgment of another State will not be deemed of any validity." Without any further citation of authorities, let it suffice to observe that, holding, as we do, that the transcript of record was properly admitted in evidence, we see, upon looking into it, that the judgment in Kentucky was in a proceeding by petition and summons, the petition claiming sums due upon notes or bills single; and under the Code of Tennessee, 3800, 3801, and Stanton's Kentucky Code of Prac., 26, § 18, we take judicial cognizance of the fact that the Circuit Court of Cumberland County was a court of general jurisdiction, with authority to determine the subject matter; and that it appears from the return of the Sheriff of Cumberland county, that he executed the summons on the 4th of October, 1865. The action by petition and summons is authorized by the Kentucky Code of Practice, p. 46, § 65. The return, "executed," was sufficient under section 75 of the Code, as expounded by the Court of Appeals in *Davige v. Colson*, cited in the Kentucky Code of Practice, p. 48, note *d*. That Code is to be received as evidence in the courts and tribunals of Kentucky, by the act of 15th February, 1860, contained in Myers' Supplement to the Revised Statutes of Kentucky, p. 203, ed. of 1866.

The judicial knowledge thus taken of the laws of Kentucky is not only in conformity to our own Code,

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but in accordance with the true spirit and meaning of the act of Congress, as expounded in 3 Am. Lead. Ca., 727, 728; and the rule as to judicial notice of the laws of the respective States, laid down in Greenl. Ev., § 490. As questions of law and fact, therefore, it is manifest from the record that the Circuit Court in Kentucky had plenary jurisdiction and authority to render the judgment; and although the court below may have erred technically in sustaining the demurrers, the record shows that this was not an error affecting the merits; and thus viewing the case, we are expressly precluded by the provisions in the Code, 4516, from reversing the judgment. The record itself shows that the pleas can not be supported. Profert was made of the proceedings; and the jurisdiction is therein fully shown, as well as in the evidence.

4. The next question submitted in behalf of the plaintiff in error is by no means free of difficulty. In his second plea, it is alleged, in substance, that owing to a great political prejudice existing at the time of the service of the summons, between citizens of Kentucky and Tennessee, the plaintiff in error could not attend to the defense of the suit there, without endangering his life; that the defendant in error, well knowing this fact, took advantage of the temporary sojourn of the plaintiff in error in the State of Kentucky to cause process to be served; and that he "fraudulently combined with the citizens of Kentucky, by force and threats, to keep him from making his defense, and took judgment against him by default, well knowing that defendant did not owe him one cent;" and that he owed the defendant in-

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stead of the defendant being indebted to him. It is insisted for the plaintiff in error, that the Circuit Court erred in sustaining the demurrer to this plea; and we hold, upon reason and the weight of authority, that this position is well taken.

In *Topp v. Bank of Alabama*, 2 Swan, 184, it was held that "a judgment rendered in one State, in pursuance of the laws of that State, is to be regarded as absolutely binding upon the parties thereto, in every other State, until it is either set aside by the tribunal rendering it, or reversed upon error." But the question of fraud was not considered in that case; and the broad principle thus announced is limited and restricted by the facts appearing in the case in judgment. For, in that case, it was held that when two judgments for the same debt had been recovered under the local laws of the State of Alabama, the one against the maker, and the other against the indorser of a promissory note, and the judgment against the indorser was paid by him, such payment extinguished both judgments; and an action could not be maintained in this State upon the judgment recovered against the principal, although it had been assigned to the indorser.

It has been seen in the passage above quoted from Story's Conflict of Laws, that the judgment is not of such absolute perfection or inviolability as to preclude an inquiry in the Court of the State in which suit is brought upon it, as to whether it is founded in and impeachable for a manifest fraud. It is said in 1 Greenl. Ev., 2d ed., § 541, that the proceedings *in rem*, of foreign Courts of Admiralty, are generally conclusive; but it is added,

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that "this is always to be understood with this limitation, that the judgment has been obtained, *bona fide* and without fraud; for, if fraud has intervened, it will doubtless avoid the force and validity of the sentence." To the same effect it is correctly stated in 2 Kent's Com., 109, m., 6th ed., "that there is no doubt of the rule that the allegation that a foreign judgment was obtained by fraud, is admissible; and if true, it will destroy its effect." And it has been held that, "in an action on the judgment of a court of another State, the defendant may show that it was obtained by fraud, or that the court had no jurisdiction:" *Warren Manuf. Co. v. Aetna Ins. Co.*, 2 Penn., 502; *Lincoln v. Tower*, 2 McL., 473; *Westweth v. Lewis*, *Ib.*, 511. See, also, 2 Kent's Com., 6th ed., 120, note *a*.

We are aware that a contrary doctrine has been held in some of the States. See 2 Am. Lead. Ca., 3d ed., 737. But such a view of the law gives to the judgment an extra-territorial operation which it does not possess in the State where rendered, was not contemplated by the Act of Congress, and is not generally conceded by the States. In an early case in this State, it was said: "There can be no doubt that the judgment of another State can be examined here whenever the party in whose name it was obtained, applies to our courts to have it effectuated. The courts here can not act blindfolded, nor was it ever intended by the Act of Congress that they should:" *Coop. Overt. Tenn. R.*, 212. In the same case, it was said that "it has been determined by our courts that a judgment of another of the United States is not to be considered in the same view as the

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judgments of a foreign country, and that the plea of *nil debet* will not lie, as it would to a foreign judgment, agreeably to the English authorities. Hence, it results that our courts seem disposed to consider the judgment of another State in the same point of view with a judgment of our own, under similar circumstances." In that case, a judgment obtained in North Carolina was enjoined; but upon what ground does not appear from the report. Subsequently, a bill was entertained to impeach a decree in equity, pronounced by one of the Circuit Courts of North Carolina, upon the sole ground that complainant and his counsel were absent when the account was taken, and had no notice as to the taking of the account. *Glasgow v. Lowther*, Cooke, Cooper's ed., 351. In *Winchester v. Evans*, Ib., 320, it was held, upon demurrer to a plea in bar of the bill, that "the record of a judgment in another State is conclusive evidence that such judgment was rendered, but a court of equity in this State is not thereby precluded from inquiring into the grounds upon which it was rendered, and granting relief in a proper case, upon the merits." Afterwards, when the cause came to be finally heard, it was held, among other things, in a learned opinion, delivered by Alfred Harris, Special Judge, "that equity will relieve against a judgment rendered in a sister State, upon any ground which would entitle a party to relief against a judgment in this State: 3 Hay, Coop. ed., 211. It is also a well-established doctrine in this State, that, when the judgment of a sister State is void for want of jurisdiction in the court rendering it, or is rendered upon an attachment of property without personal service of process, or appearance, no action can be sus-

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tained upon it in this State: *Moran v. Killibrew*, 2 Yer., 376; *Earthman v. Jones*, *Ib.*, 484. Without citing cases from our own courts, in which other questions relating to the remedies upon records from other States have been determined, we hold, upon the authority of numerous cases cited in 3 Cow. and Hill's Phil. on Ev., 2nd ed., 897, that, the general proposition there stated is correct, as follows: "That the judgment of one of the State Courts is of the same dignity in every other State as in the one where it was pronounced; and hence, if in the courts of the State where it was pronounced, it is conclusive in its operation as evidence, or otherwise, it must be equally so and to the same extent in all courts throughout the Union."

No doubt, as we apprehend, can exist, that if it were clearly shown in the proper court of any State where a judgment has been rendered, that it was obtained by fraud, it would be set aside; and where an action is brought upon it, it can have no more force or effect in the State where the suit is brought than in the State where the judgment was rendered. As we understand the decisions of the Court of Appeals of Kentucky, judgments and decrees obtained by fraud would be set aside by the legal tribunals of that State; and the judgment in the case before us is of no greater validity here than it would be in the State where it was rendered. See *Talbot v. Todd*, 5 Dana, 196; *Thomas and Wife v. Hite*, 5 B. Monroe, 598; *Kennaird v. Adams*, 11 *Ib.*, 219. It has been declared in this State, that "the judgments of courts of record are of such high verity, that their existence can not be impeached by parol proof; they

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may be vacated or set aside, if they have been obtained by fraud, inevitable accident or surprise." *Bank v. Patterson*, 8 Hum., 368, 369; *Williams v. Tenpenny*, 11 Hum., 179.

The more usual, and certainly the better, practice in this State, is to resort to a court of equity to obtain relief against a fraudulent judgment. The Code does not, in express terms, provide for any action on a judgment from another State, but divides the two classes of actions into actions upon contracts and for wrongs. 2746, 2747. It is declared, in sec. 2884, par. 2, that any pleading shall be sufficient, "when, by a fair and natural construction, it shows a substantial cause of action or defense." At common law, "a defendant could not plead that the judgment had been obtained against him by fraud, though it might be pleaded that a judgment against a third person was so obtained." 1 Chit. Pl., 486, n. But in England, as well as in several of the United States, "it has been customary to grant new trials, where judgments are obtained through fraud or trick." 3 Graham & Wat. on New Trials, 1008, 1015.

We are unable to perceive any valid reason why the defense may not be made by plea, in a court of law, to an action upon a judgment from another State, especially under the provisions of the Code; and the judgment of the court below was erroneous, in sustaining the demurrer to the plea of fraud.

4. On a careful examination of the record, we are not satisfied as to the correctness of the verdict of the jury on the plea of set off. The evidence tends strongly to show that the defendant in error is liable for the value

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of, one, at least, of the negroes referred to in the plea, whom he took in pledge and claimed as his own, before the general emancipation; but, as the entire cause will undergo a re-investigation, no decision is here made on that question.

Let the judgment be reversed, and the cause remanded for a new trial.

THOMAS L. GUNN v. JAMES NEAL.

1. EQUITY JURISDICTION. *Appeal from J. P. Error coram nobis.* A bill by defendants at law, alleging a suit by motion before a J. P., and judgment for complainants, April 28, 1860, appeal by plaintiff, failure to give appeal bond, or to have the papers carried up, or enter the cause on the docket or prosecute the appeal, until January Term, 1868, and that judgment was then taken without the knowledge of complainant, is demurrable.
2. SAME. *Same. Same.* If this bill alleges valid defenses, against the judgment, the way to make the defense was by *error coram nobis*.

FROM COFFEE.

In Chancery at Manchester, before BARCLAY M. TILLMAN, Ch.

S. E. CARNES, for complainant, cited: *Rucker v. Moore*, 1 Heis., 726; *Harrison v. Smith*, ante 230. On garnishment against officers, he cited, *Drane v. McGavock*, 7 Hum., 132; *Tucker v. Atkinson*, 1 Hum., 300. *Error coram nobis*, Code, 3116.

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JORDAN STOKES, for defendant, cited, Code, 3110 to 3118; 2 King's Dig., 5664; Car. Hist., L. S., §§ 511, 537, as to error *coram nobis*. On garnishment: 7 Hum., 132; 1 Hum., 300; 1 Heis. Dig., § 208, sub-s. 4.

NICHOLSON, C. J., delivered the opinion of the Court.

In this cause, the bill was dismissed on motion, for want of equity.

The bill alleges that a judgment was rendered at the January Term, 1868, of the Coffee County Circuit Court, in favor of Neal, for the use of Hickerson, against Gunn and others, for \$229. The judgment was rendered, on motion, against Gunn and his securities, as a Constable, for failure to pay over money collected. The cause originated before a Justice of the Peace, on the 28th of April, 1860, when the Justice gave judgment in favor of the defendants at law, from which the plaintiff appealed to the Circuit Court. It is alleged that the plaintiff failed to give an appeal bond, or to have the papers carried up to the Circuit Court; or, in any way, to prosecute his appeal in said Court, and that the case was never entered on the docket of the Circuit Court, or noticed on the minutes of said Court, until the January Term, 1868, when, in the absence of complainants, who were defendants in said motion, judgment was summarily rendered against them. Complainants insist, that the delay in bringing up the appeal was an abandonment of the same, and therefore, that the judgment was void.

The answer to this position is, first: that as complainants had knowledge that an appeal was prayed and grant-

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ed by the Justice of the Peace, upon the failure of the appellant to send up the papers, the appellees had the right to take the papers up and have the judgment affirmed; second, where the judgment was rendered against them summarily, and in their absence, their remedy to obtain redress, and to secure a trial on the merits, by writ of error *coram nobis*, was clear and unembarrassed.

It is next alleged that the judgment was unjust and inequitable, for the reason that, after the money was collected by the Constable, and before he had an opportunity to pay it over to the plaintiff in the execution, he was served with two garnishments, one from the Chancery Court, and the other from the Circuit Court, for the purpose of reaching the money in his hands, as the money of Neal, the plaintiff in the execution. It is alleged that Gunn, the Constable, answered both garnishments; and in each Court it was decided that the money in his hands, as an officer, was not liable to attachment by garnishment; from both of which judgments appeals were prayed and obtained to the Supreme Court; but complainants have not learned how the appeals were disposed of. It is alleged that the execution was collected in current bank notes, of the banks of Tennessee, Georgia and Alabama, which were then par funds; and as the Constable did not know to whom to pay the money, he deposited it in his own house; but that in January, 1865, his house was burnt, and the money destroyed by the fire.

Assuming these several allegations to be true, as we must do on the motion to dismiss, the question arises, do they relieve the Constable from his liability for his failure to pay over the money collected? If so, we see no em-

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barrassment in the way of his having availed himself of the facts stated, upon a trial of the case in the Circuit Court, to obtain which he had a plain remedy, as already stated, by the writ of *error coram nobis*.

The decree of the Chancellor is affirmed, with costs.

JACOB ROWLAND v. R. & T. JONES.

1. CHANCERY JURISDICTION. *To enjoin judgment at Law.* Where one of the makers of a note to which complainant's name was forged, sent him word by the Sheriff, who served the writ, that he was not to be troubled, but the others would pay it. Complainant having no previous knowledge of the existence of the note, then denied his liability, and avowed his determination to resist it, but was told by the Sheriff that he need not attend at the first term; was sick at the return term, and was thereby prevented from employing counsel; the other defendants employing counsel, and putting in pleas for all, but at the same term withdrawing the pleas, and allowing judgment to go against all: Plaintiff being aware of the forgery of complainant's name; it was held that complainant was not guilty of such negligence in making his defense as would preclude him from setting aside the judgment at law by bill in equity.
2. FRAUD. *What is. Judgment obtained by.* Where the plaintiff in a suit at law, knowing that his note was a forgery as to one defendant, yet permitted the other defendants to withdraw the pleas, and took judgment by default in the absence of the defendant, whose name was forged, it was held to be a fraud in obtaining the judgment, such as would entitle the injured defendant to set aside the judgment by bill in equity.

Case cited: *Kearney v. Smith*, 3 Yer., 139.

FROM COFFEE.

In Chancery at Manchester, before B. M. TILMAN, Ch.

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A. S. MARKS, for complainant, as to the power of a court of equity to grant new trials, cited: 7 Cranch, 332; 5 Sneed, 155; 3 Yer., 167; 11 Hum., 523; 4 Cold., 60; Am. Ch. Dig., 127 to 131. Proof of excuse for not making defense, certainty of: 7 Hum., 39.

JORDAN STOKES, with him, admitted that the doctrine of the earlier cases was narrowed, citing: 1 Sto. Eq. Jur., § 1574; *Burton v. Wiley*, 26 Ver., 430; *Seay v. Hughes*, 5 Sneed, 157. Stated the rule, and cited: 2 Sto. Eq. Jur., § 887; *Marine Insurance Company v. Hodson*, 7 Cranch, 332; *Roberts v. Cantrell*, 3 Hayw., 219; *Kearney v. Smith*, 3 Yer., 127; *Ridgeway v. Bank of Tennessee*, 11 Hum., 523; *Mount v. Schwab*, 4 Cold., 60. What is fraud in a judgment: 2 Gra. & Wat. New Trials, 1476, 1479, 1480; *Truitt v. Wainwright*, 4 Gilmer, 418; *White v. Cahal*, 2 Swan, 552; *Bateman v. Willoe*, 1 Sch. & Lef., 205.

R. B. DAVIDSON, for defendants, cited: *Seay v. Hughes*, 5 Sneed, 155; *Kearney v. Smith*, 3 Yer., 127; *Nicholson v. Patterson*, 6 Hum., 394; *Stokes v. L. & S. T. Co.*, 6 Hum., 241; *Lafferty v. Conn*, 3 Sneed, 221; 7 Hum., 39; *Powell v. Cyfers*, 1 Heis., 526.

—— ISBELL, with him, cited: 3 Yer., 127; 7 Hum., 39.

—— HICKERSON, with them, cited: 7 Hum., 39; *Berry v. Green*, 5 Hay., 67; 3 Hum., 559; 8 Yer., 59.

NICHOLSON, C. J., delivered the opinion of the Court.

This is an application to a court of equity for relief

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against the enforcement of a judgment at law, which is alleged to be unjust and inequitable. There can be no controversy now, as to the jurisdiction of Courts of Chancery in such cases; nor is there any difficulty in ascertaining the general rule by which courts of equity in this State are governed in the exercise of this jurisdiction. The real difficulty is, in the application of the rule, in each particular case, in which the exercise of the jurisdiction is invoked.

The rule as laid down in *Kearney v. Smith*, 3 Yer., 139, may be regarded as fully established, by numerous subsequent recognitions of it in this State. The rule so established is, that "a party will not be aided by a Court of Chancery, after a trial at law, unless he can impeach the justice of the verdict, on grounds of which he could not have availed himself at law, or was prevented from doing it by fraud, or accident, or the act of the opposite party, unmixed with negligence or fraud on his part."

It is manifest that the jurisdiction of a Chancery Court can never be successfully invoked until it is made clearly to appear that injustice has been done by the judgment in the court of law. Before a Court of Chancery will entertain an appeal to its remedial powers, in a case which has already been tried in a court of law, it must see that injustice has been done.

In the case before us, the complainant has shown clearly and distinctly, that the judgment which he seeks to enjoin was rendered on a note, on which he was never legally bound; that his name was affixed to it without his knowledge or authority, and that the act has never

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been recognized or assented to by him. The injustice of the judgment, therefore, is fully made out.

But as clearly as the injustice of the judgment is made to appear, it is better that complainant should suffer the consequences, than that the fixed rules, which define the jurisdiction of courts of law and of equity, should be broken down. Hence it is incumbent on complainant, not only to show the injustice of the judgment at law, but also, that he was prevented from making his defense by fraud or accident, or act of the plaintiffs; and that he was chargeable with no negligence or fault on his part. In the case before us, it appears that complainant made no defense whatever. The summons was served on him some time in the fall of 1860, yet, down to the January Term, 1861, of the Court, he had taken no preparatory steps for his defense, though he avowed his determination to resist the suit, even at the hazard of sending his son to the penitentiary. It is obvious that, if he had engaged counsel in advance of the meeting of the Court, he could have avoided a judgment at the appearance term, though he might have been prevented by sickness from being in attendance. To determine whether his failure to employ counsel in advance was negligence or not, depends upon the facts and circumstances in proof.

It is shown that he derived his first information as to the existence of the note, from the Sheriff, at the time the summons was served. He promptly repudiated the note, denied his liability, and declared he never would pay it. The Sheriff informed him that Ben. Layne said it was not complainant's debt, and that he must not pester him about it; but that they (meaning the other makers of the

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note, including himself,) would pay it. The Sheriff told complainant, that it was not necessary for him to attend at that Term, which would only be the appearance Term; that the others would attend to it and put in a plea which would put it off to the next Term, when he could go and attend to it. It is further proved by the Sheriff, that Ben. Layne instructed him that he was in partnership with George Layne and T. B. Rowland, the other makers of the note, and that it was their debt, and they would pay it.

It is in proof, by witness, Reynolds, that Ben. Layne and Jones, one of the plaintiffs in the suit at law, were present, and saw young Rowland sign his father's name to the note; and when he did so, saying his father had authorized him, witness looked him in the face, whereupon he turned off, when witness remarked to Ben. Layne that that signature was a forgery. Notwithstanding this significant remark by one who was well acquainted with complainant's habit of never giving his note, or going security, no further inquiry was made, but the note was received by Jones. As Ben. Layne was a partner in the purchase of the mules, for which the note was given, it was to his interest that Jones should receive the note; and for that reason, we may presume, he made no objection to the fraud thus attempted to be perpetrated on complainant for his benefit. It further appears that Jones took the note, without requiring young Rowland to show his authority for using his father's name.

These facts explain the motive which Ben. Layne had in sending the messages by the Sheriff to complainant.

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He knew that the note was a forgery, as to complainant's signature. He acknowledged that the debt was not complainant's, but his own; and he authorized the Sheriff to assure him that the debt would be paid, and he would not be troubled. In addition to all which, the Sheriff assured him that he need not attend the appearance term, but that the other parties would attend to putting in the necessary pleas.

Without now inquiring whether this effort on the part of Ben. Layne to induce complainant to hold still, and take no steps in the case, proceeded from a desire to relieve his mind from anxiety, or whether it was designed to throw him off his guard for a sinister purpose, we have no difficulty in seeing that an old and illiterate man, naturally oppressed by the necessity of subjecting his son to infamy, by fixing upon him the guilt of forgery, in making out his defense, would readily listen to the suggestions of Layne and the advice of the Sheriff, and postpone any preparation for his defense until it became absolutely essential. We are, therefore, satisfied that complainant was chargeable with no such negligence or fault, in failing to employ counsel before the appearance term of the court, as ought to repel him from a court of chancery.

The question still remains, was he prevented by fraud or accident, or by the act of the opposite party, without negligence or fault on his part, from attending and making his defense at the appearance term of the court? The proof is entirely satisfactory, that when the court came on, and during its continuance, complainant was entirely unable, from severe bodily affliction, to attend the court

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It is shown that after the court commenced, he expressed his determination to go and put in his plea of *non est factum*; but his sickness continued, and he was thus prevented from going. There can be no difficulty, on the proof, in seeing that his excuse for being absent from court, is sufficient to relieve him of all charge of negligence or fault in not being present. Without being present, he could not put in his plea. His physical condition was such that it was impossible for him to be present, without endangering his life. The law requires no such exposure to danger, to avoid the charge of negligence.

But was he guilty of negligence, in failing to employ some one to attend court and secure the services of counsel, in preventing a judgment by default? It was the appearance term, and nothing could be done beyond making up the pleadings. He had been assured by the Sheriff that there was no necessity for his being present; and he had every reason to believe that Ben. Layne would attend, and take the necessary steps to prevent a judgment by default. Layne had sent him word that the debt would be paid, and had instructed the Sheriff not to trouble complainant. Layne did employ counsel to plead for all the defendants. This was sufficient to secure to complainant an opportunity to make his defense at the next term. But, notwithstanding his knowledge that complainant's name was forged to the note, and that he intended to rely upon that fact, he took advantage of complainant's unavoidable absence, and consented to withdraw, not only his own plea, but that of complainant, and allowed the plaintiffs to take judgment. The plain-

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tiffs knew that the name of complainant was a forgery, and that he was not bound on the note; they knew that they were not entitled to a judgment at that term, without the consent of all the defendants. Yet, with this knowledge, they consent to take a judgment against complainant, knowing that he was not present to waive his rights; and immediately afterwards an appeal is taken to the Supreme Court, as well for complainant as for the other defendants. All this was done without the knowledge or authority of complainant, whereby he was deprived of all remedy, and an unconscientious advantage secured to the plaintiffs.

These facts not only relieve complainant of all charge of negligence, but they develop a fraudulent contrivance to defeat complainant's defense, which fully justifies the interposition of a court of chancery. They show that the plaintiffs in the judgment are now seeking to avail themselves of an unconscientious advantage at law, which equity will either put out of the way or restrain them from using. *White v. Cahal*, 2 Swan, 550.

The judgment will be perpetually enjoined as to complainant. The defendants will pay the costs of this court, and of the court below.

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W. P. HICKERSON v. RAIGUEL & Co.

1. BILL OF EXCHANGE. *Conditional indorsement. Notice of condition.*

Precedent debt. A bill of exchange indorsed for accommodation, and delivered to the maker on the express condition that if it was not that day discounted by a particular Bank, it was to be returned to the indorser or destroyed. Discount by that Bank being refused, the bill was passed with notice, to the United States Marshal to pay executions for the satisfaction of which the money was to be raised from the Bank. Held that there was no authority so to apply the bill.

2. CHANCERY JURISDICTION. *Relief against judgment at law. Excuse for not defending.* Suit was brought on the bill, against maker and indorser, and judgment by default, the indorser having no knowledge of the unauthorized disposition of the bill, and believing that it had passed according to the condition. Held, sufficient ground for relief in equity, there being no plea, demurrer or motion to dismiss.

Cases cited: *Kearney v. Smith*, 3 Yer., 127; 8 Hum., 127; 2 Head, 270; *Meigs' R.*, 155; 1 Head, 517; 3 Hum., 51; 5 Sneed, 443; 3 Head, 178; *George v. Alexander*, 6 Cold., 641; *Bank of Tennessee v. Johnson*, 1 Swan, 217; *Perkins v. Ament*, 2 Head, 110.

Code cited: § 4321.

FROM COFFEE.

Appeal from the Chancery Court at Manchester, B. M. TILLMAN, Ch., presiding.

The bill was filed by Hickerson alone, Estell, the other indorser mentioned in the opinion, being no party to the proceeding.

A. S. MARKS, for complainant, insisted that complainants were put on inquiry; citing: *Hunt v. Sandford*, 6 Yer., 387; *Hill v. Crosby*, 2 Hum., 545; *Hull v. Hall*, 8 Conn., 336. Bill taken in payment of precedent debt: *Wormly v.*

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Lowry, 1 Hum., 468; *Van Wyck v. Norvell*, 2 Hum., 192; *Ware v. Childress*, 6 Hum., 443; *Ingham v. Vaden*, 3 Hum., 51; *Rhea v. Allison*, 3 Head, 176; *Cardwell v. Hicks*, 37 Barb., 458; 49 Barb., 452. Complainant not bound by the bill of exchange: *Kimbro v. Lytle*, 10 Yer., 417; *Nichol v. Bate*, 10 Yer., 429; *Perkins v. Ament*, 2 Head, 110; *Woodhull v. Holmes*, 10 Johns, 231; *Skilding v. Warren*, 15 Johns, 270; *Brown v. Tabor*, 5 Wend., 566; *Vallet v. Parker*, 6 Ib., 615; *Wendel v. Howell*, 9 Ib., 170; *Small v. Smith*, 1 Denio, 583; *Catlin v. Hanson*, 1 Duer, 309; *Denniston v. Bacon*, 10 Johns, 198; *Beers v. Culver*, 1 Hill, 589; *Lawrence v. Dunstally*, 4 N. Y. Leg. Obs., 344; *Boody v. Bartlett*, 46 N. Hamp., 560; *Stone v. Vance*, 6 Ohio, 246; 11 Ohio, 65; 16 Ohio, 290.

JORDAN STOKES, on the same side, cited, on notice to holder: *Bank of Tennessee v. Johnson*, 1 Swan, 217, 227; *Holeman v. Hobson*, 8 Hum., 127; *Ryland v. Brown*, 2 Head, 270; *Donaldson v. Clements*, Meigs R., 155; *Mullins v. Jones*, 1 Head, 517. Taking for precedent debt: *Ingham v. Vaden*, 3 Hum., 51; *Vutterlien v. Howell*, 5 Sneed, 443; *King v. Doolittle*, 1 Head, 88; *Rhea v. Allison*, 3 Head, 178. Holder put upon inquiry: *Hunt v. Sandford*, 6 Yer., 387; *Hill v. Crosby*, 2 Hum., 545; *Ryland v. Brown*, 2 Head, 270. Condition valid: *Bank of Tennessee v. Johnson*, 1 Swan, 231; *Woodhull v. Holmes*, 10 Johns., 231; *Skilding v. Warren*, 15 Johns., 270; and other cases cited by Mr. Marks. He insisted that the use for the same general purpose did not affect the complainant's defense, and that *Kimbro v. Lytle*, 10 Yer., 417; *Bank of Rutland v. Buck*, 5 Wend., 56; *Bank of Shenango v. Hide*, 4 Cow., 566; *Grandin v. Leroy*,

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2 Paige, 510, had no application. Here was an express condition; there, only primary and secondary objects. Law presumes injury to indorser from diversion of the bill: *Rochester v. Taylor*, 25 Barb., 18. Marshal took illegal commissions, which made contract illegal, and released indorser: *Powell v. Waters*, 8 Cow., 669; *Wetmore v. Brien*, 3 Head, 723. Relied on payment by the principal, and a release of levy. No plea, demurrer, or motion to dismiss, citing: *Stockley v. Rowley*, 2 Head, 492, Code, 4321, 4385; *Lowry v. Naff*, 4 Cold., 370. Judgment does not oust the jurisdiction: *Hill v. Crosby*, 2 Hum., 545; *Lishey v. Smith*, 7 Hum., 299; *Marsh v. Haywood*, 6 Hum., 210.

R. B. DAVIDSON, for defendants, cited, on bills for new trial: *Seay v. Hughes*, 5 Sneed, 155; *White v. Cahal*, 2 Swan, 550; *Kearney v. Smith*, 3 Yer., 127; *Nicholson v. Patterson*, 6 Hum., 394; *Stokes v. L. & S. T. Co.*, 6 Hum., 241; *Lafferty v. Conn*, 3 Sneed, 221; *Rice v. Railroad Bank*, 7 Hum., 39; *George v. Alexanler*, 6 Cold., 641; *Powell v. Cyfers*, 1 Heis., 526. He insisted that the cases in 1 Hum., 468; 2 Hum., 192; and 6 Hum., 443, on holder for a precedent debt, did not apply, because the defendant's execution had been returned satisfied, so that he had parted with his judgment, citing: 3 Head, 179.

NICHOLSON, C. J., delivered the opinion of the Court.

About the 2d of January, 1860, James M. Sheid, being pressed for ready money to satisfy an execution from the Federal Court, against Rayburn & Co., which he had assumed to pay, applied to Wm. P. Hickerson, then in Nashville, to become his accommodation indorser on a

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bill of exchange, for \$2,500, payable at thirty days; saying that the Cashier of the Planters' Bank had promised him to discount it that day, if he presented a bill properly indorsed. Hickerson hesitated about indorsing, but finally consented, and indorsed the bill upon the express condition that, if the bill was not discounted that day by the Planters' Bank, Sheid was either to return the bill or destroy it. This occurred in the afternoon, and on the next morning Hickerson left for his home in Coffee County. Sheid presented the bill at the Planters' Bank the same evening, but the Cashier refused to discount it; whereupon Sheid went to J. B. Clemments, United States Marshal for Middle Tennessee, informed him that he had such a bill, and told him the terms and conditions on which Hickerson had indorsed it. He then proposed to Clemments, who had the executions in favor of Raiguel & Co., against Rayburn & Co., which Sheid had assumed to satisfy, that he would transfer to him, as the agent of Raiguel & Co., the bill of exchange in satisfaction of the executions. Clemments consulted the counsel of Raiguel & Co., who advised him to accept the proposition. Accordingly, Clemments took the bill of exchange, and entered upon the executions a receipt in full satisfaction. The amount of the two executions was about \$2,200, and Clemments agreed that when the bill was collected he would refund the excess to Sheid.

The bill was dishonored at maturity, and suit brought thereon to the September Term, 1860, against Sheid and the two indorsers, Hickerson and Estell. The indorsers made no defense, and permitted judgment to be entered against them at the Appearance Term, and thereupon took

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judgment by motion against Sheid; and at the May Term, 1861, Raiguel & Co., took judgment against Sheid on the bill.

No execution issued on this last named judgment, until January, 1863, when one was issued, and levied on a tract of land belonging to Sheid, estimated to be worth \$4,000. After the levy on the land, Sheid paid, in Confederate currency, the amount of the execution to the Sheriff of Coffee County, who receipted and satisfied the execution. Sheid thereupon sold and conveyed the land, and became insolvent. When the Sheriff tendered the money received on the execution, to the counsel of Raiguel & Co., they refused to receive it; whereupon, they caused execution to issue against Hickerson on the judgment rendered against him as indorser at the September Term, 1860.

The bill is filed by Hickerson to enjoin the execution so issued.

The first question for determination, is, whether injustice was done to complainant by the judgment rendered by the Circuit Court, at the September Term, 1860. It appears that he made no defense, but permitted judgment to be entered at the appearance term without objection. This is conclusive against his application for relief, unless he had a good defense, and failed to make it on account of accident, or fraud, or the action of the opposite party, unmixed with negligence or fault on his own part. *Kearny v. Smith*, 3 Yer., 127.

The proof shows that when complainant indorsed the bill, he did so upon the express condition that if the Planters' Bank did not discount the bill on that day, his liability as indorser was to cease, and the bill was either

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to be returned or destroyed. It is wholly immaterial whether complainant knew the use which Sheild proposed to make of the money, or not. He was indorsing without consideration, and for the accommodation of Sheild, and had the right to annex such terms and conditions to his liability as he saw proper. *Perkins v. Ament*, 2 Head, 110; *Bank of Tennessee v. Johnson*, 1 Swan, 217. It is clear that when the Planters' Bank refused to discount the bill, and the day had expired during which it was to be presented, the liability of complainant was terminated. The only liability which could then be created must have arisen from the transfer of the bill, in the due course of trade, to some innocent purchaser, for value. But the proof shows that when Sheild offered to transfer the bill to Clemments, who was acting as the agent of Raiguel & Co., in the collection of their execution, he informed him of the terms and conditions which complainant had annexed to his indorsement. It follows, that Clemments took the bill with full notice that Sheild had no authority to use it for any purpose and in any way. As Clemments was acting as the agent of Raiguel & Co., they would be affected with the notice which their agent had.

But the proof further shows that the bill was taken by Raiguel & Co. in payment of a claim which they had against Rayburn & Co., and which claim Sheild had undertaken, by contract with Rayburn & Co., to pay. The bill, therefore, was received in payment of a pre-existing debt, and was taken, subject to all the equities and defenses which the indorser could lawfully set up against the liability in the hands of Sheild. 8 Hum., 127; 2

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Head, 270; Meigs' R., 155; 1 Head, 517; 3 Hum., 51; 5 Sneed, 443; 3 Head, 178.

It follows, that if complainant had made his defense in the suit at law, he would have had the right to rely upon the fraud practiced upon him by Sheid, in transferring the bill without authority, and in violation of the terms and conditions of his indorsement; and, under the law, a verdict and judgment, upon the facts disclosed in the record, must have been rendered in favor of complainant. The injustice of the judgment against him is thus made manifest.

But it is not enough that the judgment was unjust. It must also appear by the proof, that complainant, without negligence or fault upon his part, was prevented by accident, fraud, or the action of the opposite party, from making his defense, before he can entitle himself to relief against the judgment. The excuse on which he relies for allowing judgment to be taken without defense, is, that at the time the judgment was rendered against him, in September, 1860, he was under the impression that the bill had been discounted by the Planters' Bank, and that he was bound by his indorsement. It was under this conviction that he permitted judgment to be taken at the appearance term. He states further, both in his bill and in his deposition, that the first information or knowledge that he acquired as to the refusal of the bank to discount the bill, and the fraudulent diversion thereof by Sheid, was derived after the judgment was rendered in May, 1861, against Shied. The truth of this explanation of his failure to make his defense is fully established by the proof. It follows, that when the judgment was rendered

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against him in September, 1860, he was unable to make his defense, because of the fact that Shied had concealed and withheld from him, the fraudulent use which he had made of his indorsement. It was impossible for him to avail himself of a defense, of the existence of which he had no knowledge. The facts constituting his defense rested alone in the knowledge of defendant's agent, Clements and Sheid, who had perpetrated the fraud, and by both it was withheld from complainant until after the judgment in the Circuit Court. This circumstance distinguishes this case from that of *George v. Alexander*, 6 Cold., 641.

In the case of *Marine Insurance Co. v. Hodgson*, 7 Cranch, 336, Chief Justice Marshall, says: "It may be safely said, that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, and was prevented by fraud or accident, unmixed with any fault or negligence in himself, will justify an application to a court of chancery." In Adams' Equity, 197, it is said: "The rule on this subject, seems to be, that, if, after judgment, additional circumstances are discovered, if their non-discovery has been caused by fraudulent concealment, the fraud will warrant an injunction." But we deem it unnecessary to pursue the investigation further, as to the jurisdiction of the Chancery Court.

The defendants have failed to demur or plead, or to move to dismiss the bill, but have answered and taken issue upon the merits. The cause must, therefore, be heard and determined upon its merits. Code, 4321.

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As we are satisfied that complainant is entitled to relief upon the grounds already stated, we deem it unnecessary to examine the question as to the effect upon complainant's rights, of the satisfaction of the judgment of Raiguel & Co., in Confederate money, by Sheid.

The decree of the Chancellor will be affirmed, with costs.

W. K. McCLENDON *et als.* v. SAMUEL HARLAN *et als.*

GUARDIAN BOND. *Covers land fund converted before its execution.* The sureties of a general guardian are liable on the ordinary bond for money, proceeds of real estate¹ converted by decree before the execution of the bond.

FROM WILSON.

Appeal from the decree of J. P. STEELE, Ch., sitting at Lebanon.

The real estate of Wm. F. Jones was sold by decree of the Circuit Court of Wilson, on the 26th day of October, 1849, upon a credit of one and two years, and produced a fund from which complainants, the wards, were entitled to receive \$491.30, in addition to \$104, proceeds of personalty.

At the February Term, 1850, of the County Court, defendant, J. H. Barclay, the father of complainants,

¹ On the liability of securities of executors on their bond, see *Lester v. Vick*, *post* —.

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was appointed guardian, and gave bond, with the other defendants as his sureties, in a penalty of \$1,200.

The proceeds of the land were paid to the guardian, under two decrees of the Circuit Court; the first reciting that the guardian had given bond to the County Court in a sum sufficient to cover the amount produced by the sale of the land, and ordering the amount then collected to be paid over. The second instalment being collected, the Court ordered that it be paid over, when the bond was increased sufficiently to cover the amount. But the Clerk finding it already sufficient, paid it over without further bond. This bill was filed for an account of the guardian's receipts, and to recover the fund from the guardian and her securities.

ROBERT CANTRELL, for complainants, insisted that the bond was in double the amount of the whole fund, and was made to cover this very fund, and that it was paid over on this bond. He commented on the case of *Baker Andrews' heirs*, 3 Hum., 592, and insisted that it did not control this case, as it did not involve the construction of the Act of 1823, c. 2, C. & N., 371; that the act of 1852, c. 166, did not apply, as it was passed after the money was received. He cited the Acts of 1823, c. 2; 1842, c. 117, s. 3; 1762, c. 5, s. 5; 1825, c. 45, secs. 1, 2 and 3.

WILLIAMSON & MARTIN, for defendants, cited the case of *Baker Andrews' heirs*, 3 Hum., 592; *Reeves v. Steele*, 2 Head, 647; *Hancock v. Hubbard*, 19 Pick, 171; Act of 1852, c. 166, s. 4; Code, 3317, as a legislative construction of the previous acts, and insisted that a

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general guardian's ordinary bond would only embrace the estate devised from the personal representative.

TURNEY, J., delivered the opinion of the Court.

The decree of the Chancellor must be reversed.

The only question presented for our consideration is: Are the securities upon a general guardian bond liable for a fund derived from the sale of real estate under a decree of the Chancery Court, and paid into the hands of the guardian, the sale having been made and notes taken for the purchase money, before the appointment of the guardian, and of course before the execution of the guardian bond?

The sale was a conversion of the realty into personalty; and the securities are liable to the extent of their bond.

This opinion is not in conflict with the rule that the securities of a general guardian are not bound for the funds paid to him, which have been created by the sale of real estate by order or decree of the Chancery Court, for the purpose of division amongst the minor heirs. This rule contemplates the sale of realty after the appointment of the guardian and the execution of his bond; in which case, before the guardian is enabled to receive the fund, he must execute a special bond.

The Chancellor held the contrary; his decree is reversed, and the cause is remanded for an account.

J. G. Frazer v. John C. Sypert.

J. G. FRAZER v. JOHN C. SYPERT.

1. USURY.¹ *Discount of paper made to raise money. Notice.* If a note is made and indorsed to raise money, but is taken at a discount of 20 per cent., without notice of the fact that it is not a real transaction, the discount is not usurious.
2. SAME. *Same. Same.* If the holder takes the paper from one who he states he believed was the agent of the *indorser and maker*, that is not evidence of notice.

FROM WILSON.

Appeal from the decree of J. P. STEELE, Ch., sitting in the Chancery Court, at Lebanon.

The bill was filed after judgment, to be relieved of the usury in the note. It contained this interrogatory: Let him (Sypert) state who he got this note from, and if he believed he owned the note, or was agent for said Z. W. Frazer?

In response to this interrogatory, defendant, Sypert, answered that "he obtained the notes mentioned from his co-defendant, Moore, and believed at the time, and now believes, if there was any agency, as stated by complainant, that Moore was agent for J. G. Frazer, the indorser on said note, and for Z. W. Frazer, the drawer.

B. J. TARVER and E. I. GOLLADAY, for complainant, cited 3 Head, 723; relied upon the admission of defend-

¹ See *Woods v. Rankin*, ante, 46, and note 1, and cases there cited. See, also, *Jackson v. Collins*, post —, and see *Sinclair v. Peebles*, 5 Cold., 584.

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ant, that he believed at the time of purchase that Moore was selling as the agent for the maker and indorser of the note.

R. E. THOMPSON, for Sypert, cited 4 Hum., 245; 7 Hum., 450; 8 Hum., 129; 3 Head, 727; 1 Cold., 183.

NELSON, J., delivered the opinion of the Court.

Complainant alleges, in substance, that Z. W. Frazer, having authority to use his name as security in his business affairs, and being embarrassed in his circumstances, drew a note for the purpose of raising money, upon which he signed complainant's name as security or indorser; and that it was sold to Sypert, who had full knowledge of the purpose for which the note was executed, at a large and enormous rate of discount; and that the purchase was a usurious transaction. Sypert obtained judgment on the note, and the bill was filed to enjoin its collection, but the injunction was dissolved on the coming in of the answers.

The facts, as shown in the proof, are: That the note was executed for the purpose stated; that Moore, a Constable, had executions in his hands against Z. W. Frazer, for collection; that Frazer handed him the note for collection, in 1859, for \$250, indorsed by J. G. Frazer, stating at the time that it was made and indorsed for sale, and for the purpose of raising money, and instructing him to sell it on the best terms; that Moore sold the note to Sypert at about twenty per cent. discount, and applied the proceeds to executions in which Sypert was in no way interested.

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Moore, in his answer and deposition, states that he "did not tell, or in any wise inform, his co-defendant of the circumstances under which the note was gotten up, and for what purpose." Sypert, in his answer, says that he "can not state whether said note was made to raise money or not, nor does he know its consideration, or to what use, or how, the money was applied he gave for said note;" and that the note is the only debt or claim he had upon complainant. He denies, most positively, that he knew anything about the note having been made with a view to sale. He states that he believed, and still believes, that Moore, from whom he purchased, was agent for the maker or indorser. His answer is silent as to whether he had any information on the subject at the time of the purchase; but there is no proof to show that such information was communicated to him.

Z. W. Frazer and Thomas B. Moore were the only witnesses examined in the cause. Frazer states no fact or circumstance, tending to show that any information as to the character of the note was communicated to Sypert, before the purchase. Moore, in his deposition, says: I did not tell Sypert how the note was gotten up, nor for what purpose; for, if I had done so, I know I could not have sold it to Sypert."

In *Ramsey v. Clark*, 4 Hum., 245, it was held, that, "if the purchaser of the note knows nothing about the consideration for which it was made, and takes an assignment of it, supposing it to be a lawful business transaction, he can be guilty of no desire indirectly to receive a greater amount of interest than the law allows." The same principle is recognized in *May v. Campbell*, 7 Hum.,

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450. That case is not overruled in *Holman v. Hobson*, 8 Hum., 129, 130; and in *Wetmore v. Brien and Bradley*, 3 Head, 727, it is distinctly held that the purchase must be "with knowledge of the facts, either actual or inferable from the facts of the case," to make the contract usurious. The same principle is recognized in *Doak v. Snapp*, 1 Cold., 183.

The mere failure of the defendant to answer the interrogatories as to his belief, is not a sufficient circumstance against him upon which to found a decree, as complainant failed to except, and to compel a full answer. Moore's evidence, under the circumstances, proves a negative, and shows clearly that Sybert had no knowledge of the purpose for which the note was executed.

The Chancellor's decree is clearly erroneous, and let it be reversed.

EDWARD R. VANCE v. THOS. J. SMITH *et als.*

1. FRAUDULENT CONVEYANCE. *Creditor. Plaintiff in tort.* A deed of trust made in contemplation of an action of *tort*, and a recovery therein, which provided first for certain preferred debts, and then for the payment of all other creditors and indorsers of the maker, is not fraudulent, for it provides, whether so intended or not, for the recovery in the action of *tort*; *Farnsworth v. Bell*, and *Patrick v. Ford*, 5 Sneed, 531, 537.
2. CREDITOR. *Plaintiff in tort.* A plaintiff in an action of *tort*, who has not recovered his judgment, is an existing creditor, embraced in a deed providing for the payment of *all* creditors.

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3. **FRAUDULENT CONVEYANCE.** *Parol proof.* A deed can not be attacked by parol proof, to show that it was intended to delay creditors, for the payment of whom it provides on its face.
4. **SAME.** *Payment of claims.* A strong presumption of the fairness of a deed is raised by the subsequent settlement of the claims, in fraud, of which, it is charged to be made.
5. **DEED.** *Construction.* *To pay creditors, means existing creditors.* A deed providing for the payment of all creditors, and disposing of the surplus to third persons, provides for debts only, which existed at the making of the deed.
6. **VOLUNTARY CONVEYANCE.** *Provision for payment of debts.* A voluntary conveyance made by a person indebted at the time, but providing for the payment of all his just debts, and settling the surplus only, is not fraudulent as to subsequent creditors.
7. **SAME.** *Duty to provide for wife.* It is a duty of a husband to provide for a wife, in contemplation of an indefinitely prolonged absence from home.
8. **EVIDENCE.** *Declarations made after the deed.* Declarations of the maker, or the trustee of a deed, prejudicial to its validity, made subsequent to the making of the deed, are inadmissible in evidence to affect the beneficiaries in the deed.
9. **TRUSTEE.** *Failure to give bond.* *Effect of.* The failure of a trustee to give bond as required by the Code, § 1974; 1856, c. 113, does not affect the validity of the deed. It is merely a ground of removal.
10. **CONFEDERATE NOTES.** *Promise to take back.* A payment in Confederate Treasury Notes, voluntarily received and credited on a note, will not be set aside because of a subsequent promise, without consideration, to "take it back."

Cases cited: *Farnsworth v. Bell*, and *Patrick v. Ford*, 5 Sneed, 531, 532; *Nicholas v. Ward*, 1 Head, 323; *Martin v. Olliver*, 9 Hum., 561; *Hester v. Wilkinson*, 6 Hum., 217; *Trotter v. Watson*, 6 Hum., 514; *Mills v. Haines*, 3 Head, 334.

Code cited and construed, 1974.

Statute cited, 1856, c. 113.

FROM WILSON.

Appeal from decree of J. P. STEELE, Ch., sitting in the Chancery Court at Lebanon.

TARVER & GOLLADAY, for complainant, cited on con-

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veyance to separate use: *Houston v. Embry*, 1 Sneed, 489; *Meredith v. Owen*, 4 Sneed, 223; Hill on Trustees, 420; 2 Sto. Eq. Jur., 1378; 8 Yer., 33; *Powell v. Powell*, 9 Hum., 486; 3 Hum., 631; 1 Swan, 128. As to admissions to affect deed: 5 Hay., 606, Cooper's ed.; 6 Yer., 272; 9 Hum., 750; 2 Swan, 80; 1 Cold., 308. Conveyance voluntary: 9 Hum., 486. As to fraudulent conveyance: 4 Yer., 164; 1 Tenn., 300; *Farnsworth v. Bell*, 5 Sneed, 531; *Patrick v. Ford*, Ib., 532. Insisted that the contemplated recovery in *tort* was held not a *debt*, or the plaintiff a *creditor*, until judgment: *Langford v. Fly*, 7 Hum., 585; and that the cases in 5 Sneed, were not published until 1859, and were not known when this deed was made, 18th May, 1859.

JORDAN STOKES & SON, for defendants, insisted that admissions of husband were during wife's possession, not his, and cited on possession of husband and wife: *Foster v. Jordan*, 2 Swan, 476. As to admissions before sale: *Mulholland v. Elliston*, 1 Cold., 307; *Sugg v. Powell*, 1 Head, 221. Or during possession which is inconsistent with sale: *Trotter v. Watson*, 6 Hum., 509; *Carnahan v. Wood*, 2 Swan, 500. Otherwise as to possession consistent with deed: *Neal v. Peden*, 1 Head, 546; *Trotter v. Watson*, 6 Hum., 509; *McClellan v. Cornwell*, 2 Cold., 298; 1 Cold., 312. Fraudulent conveyance: *Hefner v. Metcalf*, 1 Head, 577; Burrill on As'gmt, 2 ed., 374, 404; *Meux v. Howell*, 4 East, 1, 13; 5 Sneed, 531, 532. 'Creditors' included Hunt's claim. Intent to defraud one creditor will not avoid a deed to pay all creditors: Burr. on Asg'mt, 704, 5, 2 ed.; *Pickstock v. Lyster*, 3 M. & Selw., 337. Subsequent creditors: 6 Hum.,

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215; 9 Hum., 561; 1 Head, 323; *Sexton v. Wheaton*, 8 Wheat., 229; 1 Sto. Eq. Jur., § 361. Beneficiary must be charged with the fraud: 6 Hum., 574; 3 Head, 334, 5; *Billups v. Sears*, 5 Grat., 31; *Brannock v. Brannock*, 10 Ired., 428; *Anderson v. Hooks*, 9 Ala., 704. Subsequent must attack through existing creditor: 1 Sto. Eq. Jur., § 361, and n.; *Eed v. Knowles*, 2 Yo. & Col., N. S., 172; *Richardson v. Smallwood*, Jacobs' Ch. R., 532. Court may hold deed good in part: *Brannock v. Brannock*, 10 Ired., 428. Voluntary settlement: *Stephens v. Olive*, 2 Br. Ch. R., 90; 8 Wheat, 229; Adams Eq., side p. 147; 6 Hum., 215.

VICK, with him, cited: 1 Greenl., § 80; 3 Id., 354; 4 Sneed, 431; 5 Sneed, 531; 9 Hum., 565; 1 Head, 323; 6 Hum., 215; 3 Head, 334, 5; 6 Hum., 514. Possession by husband: 9 Hum., 566. Admissions: Hill on Trust., 167; 5 Ves., 700; 6 Hum., 514; 5 Sneed, 535; 2 Cold., 305.

WILLIAMSON & MARTIN with them.

NELSON, J., delivered the opinion of the Court.

On the 17th of May, 1859, Thomas J. Smith had a personal rencontre with A. P. Hunt, in the course of which he inflicted such personal injuries that he was apprehensive they would result in the death of Hunt; and in consequence of his fears of a criminal prosecution, and an action for damages, he determined to leave the country and not undergo a trial in a court of justice. Before leaving the country, he executed two deeds of trust to William D. Smith, each bearing date 18th May, 1859. In the first of said deeds, he conveyed six slaves, in trust, to secure the payment of a bill of exchange, for \$1,500, indorsed by W.

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D. Smith; a note of \$2,000, due said Smith; a note for \$500, due to Jordan Stokes; and various other debts, specially mentioned, with power to the trustee, if the debts, by note and account, were not paid within twelve months from the date of said deed, to sell the slaves, at public or private sale, for cash or on time, as he might deem best in the exercise of a sound discretion; and to apply the proceeds to the payment of the debts, in the order mentioned in the deed. It is further provided in said deed that, "if, after the payment of the debts herein specified, any of the proceeds shall remain in his (the trustee's) hands, they shall be applied to all such debts as I owe; and the balance, if any there remain, to lie in his hands, subject to my order."

In the second deed, the said bargainor conveyed to the trustee, twelve negroes and the tract of land upon which he then lived, about three miles from Lebanon, and "all his stock of all kinds, household furniture, etc." The trusts declared in said last named deed, are as follows "The condition of the above conveyance is such, that whereas, I am still indebted to Smith and Lester, for said land, and am considerably indebted to other persons, and am desirous of securing them; and whereas, I have executed to said William D. Smith another deed of trust, of this date, to other property; and, as such property may not be sufficient to secure all of my indorsers and creditors, I have this day, also, made the above conveyance, in trust, to my said trustee, for the purpose of securing all of my creditors and indorsers; and if my debts are not paid and satisfied at the expiration of twelve months from this date, then my said trustee is authorized to sell so much,

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or all, of said land and negroes, stock, etc., as may be necessary to settle all my debts; and the balance, if there be any property or proceeds of sale, I now, by these presents, give, in consideration of the natural love and affection I bear for her, to my beloved wife, Elmira Jane Smith, to her own proper use and behoof; to be left, however, in the hands of said William D. Smith, as her trustee; and by these presents, to carry out the above gift to my said wife, I convey and transfer, to said William D. Smith, all legal title in and to such property, as may be left after the purposes of this deed of trust, as to my indebtedness, are fully executed."

The deed first named was duly registered in the Register's Office of Wilson County, on the 19th May, 1859, and the second deed on the 20th of the same month.

After the execution of the deeds, and at some time, not definitely shown, during the year 1860, T. J. Smith purchased of complainant "a lot of mules," for which he executed two notes, not exhibited in the record: the one for \$1,200, and the other for \$500. On the larger note, complainant obtained judgment against said Smith, and against the administrator of Bennet, who was Smith's security, for \$1,531.50, at the September Term, 1865, of the Circuit Court of Wilson County, upon which it is alleged, in the bill, that execution was issued and returned "no property found;" though no copy of this proceeding is exhibited. He also alleges that he recovered judgment before a Justice, against Smith, and Tarver, his security upon the note for \$500, upon which, it is alleged, execution was also issued, and a similar return made.

This bill was filed on the 13th December, 1865, against

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the proper parties, to hold the executrix of the trustee liable for his alleged neglect in not selling said slaves, and for the purpose of causing said deeds to be annulled for fraud, and of obtaining satisfaction of said judgments by a sale of such of said property as still remained on hand.

On the 9th April, 1866, Mrs. S. C. Smith and P. S. Lester filed their answer and cross bill, in which they alleged that they were the owners of said tract of land, and had sold the same to T. J. Smith, to whom they executed a title bond for the conveyance of said land, on the payment of his note for \$4,680.30, dated 14th September, 1858, and due 1st January, 1859, for the purchase money. They admit that this note was credited 3d January, 1859, with \$1,500, and with \$1,200 on the 1st March, 1863. The said Sarah C. Smith is the widow and executrix of W. D. Smith, the trustee, who died within a few months after the execution of said deeds; and she claims that she found other evidences of debt, among her husband's papers, against T. J. Smith, to the amount of \$2,385.08, which are to be credited with certain sums not specified. It is alleged in said answer and cross bill, by the said Sarah C., that her co-defendant, Thomas J. Smith, paid the said sum of \$1,200 in Confederate "money;" that she refused to take it, but he prevailed on her to receive it. She charges that he said, on the next morning afterwards, that he would take the Confederate money back, but when she sent it, on the succeeding day, he refused to do so.

Time was extended to Thomas J. Smith and wife, and they filed their answer and cross bill on the 11th April, 1866, the details of which it is unnecessary here to state.

It has been strenuously insisted for Vance, the com-

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plainant in the original bill, that the deeds of trust were executed for the avowed purpose of evading the laws, and of defeating any recovery that Hunt might obtain in damages; that Hunt, having brought suit, just before the execution of the deeds, was, in law, a creditor; that the deed was fraudulent as to him, and being fraudulent as to existing, was fraudulent and void as to subsequent creditors. Among other things, the provision in the second deed, in favor of the bargainor's wife; the declarations of the bargainor and trustee, made after the execution of the deed, to the effect that T. J. Smith was still the owner of the property, and that its only object was to defeat Hunt's recovery; the credit extended upon the faith of Smith's continued possession and ownership, are relied upon as furnishing the most conclusive evidence of the fraudulent character of the deeds. We are satisfied, however, from various facts and circumstances disclosed in the record, that the deeds can not be invalidated for any of the reasons alleged in the bill, or urged in argument.

1. Assuming that Hunt, the plaintiff in the suit for damages, should be regarded as a "creditor" within the meaning of the law, as expounded in *Farnsworth v. Bell*, and *Patrick v. Ford*, 5 Sneed, 531, 537, we hold that, as a creditor, he was expressly embraced within the provisions of the second deed of trust, in which it is twice declared that it is executed for the purpose of securing *all* the creditors and indorsers. And even upon the assumption, which is not made out by the proof, that it was declared, at the time of the execution of the deed, both by the bargainor and trustee, that their object was to defeat the recovery of Hunt; and supposing they were igno-

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rant that the word "creditors" would include him, we declare the law to be, that such parol declarations could not control the positive and unmistakable provisions of the deed, and that if Hunt had obtained judgment, they could not have alleged their own turpitude of intention to show that he was not one of the creditors whom they designed to secure. But in this case, a strong and irresistible presumption, in favor of the fairness of the deed, is raised by the facts that the suit with Hunt was afterwards compromised, and his damages discharged; and that, by means of the private sale of part of the negroes, all the other debts were satisfied except those due to W. D. Smith, the trustee, and Jordan Stokes, one of the creditors, who appear to have been satisfied with the provisions in their favor, and to have taken no active measures to enforce a sale of the trust property.

2. It is now a firmly established principle of equity jurisprudence, that "a voluntary conveyance, made by a person not indebted at the time, in favor of his wife or children, cannot be impeached by subsequent creditors upon the mere ground of its being voluntary." See 1 Story's Eq. Jur., § 362; *Sexton v. Wheaton*, 8 Wheat, 229; *Hord's lessee v. Longworth*, 11 Wheat., 199; *Nicholas vs. Ward*, 1 Head, 323; *Martin v. Oliver*, 9 Hum., 561. The adaptation of this principle to the case at bar is not difficult. Here the bargainor conveyed all his property for the benefit of all his creditors, and settled the surplus, if any, after the satisfaction of their demands, to the separate use of his wife. This was perfectly lawful, according to *Hester v. Wilkinson*, 6 Hum., 217. It is a

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avored doctrine in equity, that, creditors out of the way, a conveyance by a husband or father for the support of a wife or child, is founded on a meritorious consideration; and in this case, as all the creditors were provided for, the effect is the same as if there were none. In some respects, the wife is considered, by virtue of the marriage, as the creditor of the husband; and, by express statutory enactment, her claim to dower is preferred to that of his mortgagee or trustee, before foreclosure or sale. Code, 2900. How, then, can a post-nuptial settlement, in her favor, be avoided by one who was not a creditor at the time, and who, as in this case, was charged with notice of the settlement, by the registration of the deeds, before he became a creditor?

The case of *Martin v. Oliver*, 9 Hum., 561, was, in one aspect, stronger than this; for there, a reversionary interest was reserved to the husband in the deed he executed. In that case, it was held that "the deed, being required to be registered, is constructive notice to all persons of its existence. Those who deal with the husband, after the execution of the deed, have the means of acquiring full knowledge, at their peril, of the true condition and title of the property of which he may be the ostensible owner and if they trust him upon the faith of such visible ownership, it is the fault of their own indiscretion and want of vigilance but they can not, in any proper sense of the term, be said to have been defrauded." *Ibid*, 565.

However reprehensible it may have been in the husband to become a fugitive from justice, or however well

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or ill founded may have been his fears of a criminal prosecution, it was certainly a duty of the strongest legal and moral obligation, on his part, to provide for the wife from whom his misfortune was about to separate him; and, instead of his deeds being fraudulent, they were, in the highest degree, commendable. If the cause of the husband's absence resulted more favorably than he anticipated, no court of equity would compel the wife, or her trustee, to re-convey to the husband. The title to the residue of property, or the surplus proceeds of its sale, is absolutely vested to the sole, separate and exclusive use of the wife, and neither he, nor any of his subsequent creditors, can cause it to be divested.

3. The declarations of T. J. Smith and W. D. Smith, made after the execution of the deeds of trust, to the effect that he was as solvent as he ever had been; that the conveyances were executed for the purpose of avoiding the payment of any damages to Hunt, and that he could pay his debts, and be worth twenty thousand dollars besides, were properly objected to, and were inadmissible as evidence. The rights of Mrs. Smith and the other beneficiaries in the trust deeds, who had no knowledge of such declarations, and no agency in causing them to be made, could not be thereby prejudiced or destroyed. See 6 Hum., 514; 3 Head, 334. But it is useless to cite authorities or review our own cases on this question, as we hold that the deed was made *bona fide*, and that the possession afterwards was in accordance with it. It is difficult to conceive how such declarations, if they were even admissible in this case, could have exerted any influence upon the mind of complainant, as it is manifest, from the

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fact that he required T. J. Smith to give personal security, that he did not place much reliance upon them.

4. The deeds of trust are not void because the trustee failed to execute bond and make affidavit, as required by the Code, 1974. That section re-enacts, with slight alterations, sections 9 and 10 of the Act of 1856, chap. 113, Acts 1855-6, pp. 124, 125, which was expounded by this Court in *Mills v. Haines*, 3 Head, 334, 335. It was there held that the failure of the trustee to comply with the requirements of the statute, furnishes a sufficient reason for displacing him and appointing another in his stead; but in the absence of fraud on the part of the beneficiaries, the legal operation and validity of the trust would not be impaired for that reason; and we adhere to and approve the construction thus given.

5. Although the title papers are not contained in the record, it is admitted in the pleadings that there is a balance of purchase money due for the land, and the vendor's lien will be declared and enforced by a proper decree; but the sum of twelve hundred dollars, paid upon that debt in Confederate money, and credited upon the note, will remain as a credit. It is not alleged in the answer and cross bill, that there was any compulsion or duress in this transaction, and it is shown by the proof that Mrs. S. C. Smith acted freely and voluntarily in receiving the money. The contract was fully executed before the alleged promise, next morning, "to take the money back;" and if that promise were fully proven, as it is not, it was made without consideration, and can not be enforced.

6. No other debts will be provided for, in the sale

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of the trust property, except such as existed at the date of the trust deeds, or were embraced in the terms of the trust. Subsequent creditors will not be let in to share the fund.

Affirm the Chancellor's decree, with costs.

CATHARINE TOWLS *et als.* v. ISAAC RAINS *et als.*

DESCENTS. *Mother, when the heir.* Lands descended from the father of an intestate who dies unmarried, without brothers or sisters, or the issue of such, will descend to the mother, if living.

Cases cited: *Beaumont v. Irwin*, 2 Sneed, 291; *Roberts v. Jackson*, 4 Yer., 321.

Statute cited and construed: 1842, c. 171, s. 1.

Statutes cited: 1784, c. 22, ss. 3 and 7; 1784, c. 10, s. 3.

Code construed: 2420.

FROM WARREN.

In Chancery at McMinnville, before J. P. STEELE, Ch.

J. P. & J. L. THOMPSON, for complainants, cited *Beaumont v. Irwin*, 2 Sneed, 291; Acts of 1784 and 1842.

A. S. COLYAR, for defendants, cited Code, 2420.

SNEED, J., delivered the opinion of the Court.

The question in this case, is upon the construction of the statutes of descent. The complainants are the aunts, on the paternal side, of Jasper McCracken, who

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having inherited an estate in lands from his father, died intestate, unmarried, without issue, and without brothers, sisters, or the descendants of such, and leaving his mother surviving him. The mother is now dead, and the defendant, Isaac Rains, her second husband, was in possession of the land when this litigation began. The question is, whether, upon the death of Jasper, the inheritance in fee fell upon his surviving parent, or upon the right heirs of the deceased father.

This case is not like that of *Beaumont v. Irwin*, 2 Sneed, 291, in which it was held that, by the act of 1842, c. 171, s. 1, upon the death, intestate, of a person owning real estate inherited from the father, without issue or brothers and sisters, or the issue of such, or father or mother surviving, such real estate vests in the right heirs of the father. In consequence of this construction of the act of 1842, this precise principle has been carried into the Code in more express terms by Hon. R. J. Meigs, who made an able argument in this Court in the case of *Beaumont v. Irwin*. That case simply preserves the estate in the line of the transmitting ancestor when both parents are dead. This case presents the question of the effect of the survivorship of the mother of the intestate, when the estate came from his deceased father.

The parental line of inheritance was first engrafted upon our law by the act of 1784, c. 22. It was a principle in feudal times, that when the tenant in fee died, the estate should descend, and not ascend. It was an observation of Judge Haywood, that the mission of the two acts of 1784, c. 22, ss. 3 and 7, and c. 10, s. 3, was "to destroy primogeniture; to destroy the indi-

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visibility of estates, and to preserve real estate in the blood of the transmitting ancestor. This is unquestionably true; but another and a favorite object of those laws was to create the parental line of inheritance, and to make the collateral line subordinate to the lineal ascending line. And the law-givers seemed to betray rather an uncommon solicitude to this end; and to set at rest all conjectures as to the intention of the law, they gravely announce it in a preamble to each of said acts. Thus the preamble to the 7th section of the first-named act sets forth that, "whereas, by the law of descents, when one dies intestate owning an estate in lands, leaving no issue, or brother or sister, such estate now descends to some collateral relation, notwithstanding the intestate may have parents living: a doctrine grounded on a maxim of law not founded in reason, and often iniquitous in its consequences." The preamble to the 3d section of c. 10, recites, that "by the 7th section of the act of 1784, c. 22, real estate actually purchased or otherwise acquired by any intestate, is to descend to the father, if living; but if dead, then to the mother of such intestate and her heirs, by which the descent may be altered by the accident of death; and the paternal line, which is favored in all other instances, may be deprived of the inheritance by such accident." Under these two statutes of 1784, it was held in North Carolina that the estate which a mother may inherit from the child does not mean such an one as has descended from the father: 2 Hay, 115; 2 N. C. Law Rep., 406; 1 Murphy, 493. And under the same acts, it was held here, that lands acquired by descent from the father do

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not, upon the death of the child intestate, and without issue, vest in the mother for life: *Roberts v. Jackson*, 4 Yer., 321. By these statutes, which were nearer the age of entails than to our generation, and which are not altogether free from the infection of old English ideas, the paternal line of inheritance was preferred and favored over the maternal, except when the latter was the line of transmission. But the act of 1842, c. 171, s. 1, made a material innovation upon the laws of descent, so far as to break down the great advantage of the paternal over the maternal line, except when the one or the other happens to be the line of transmission. That act prescribes that the father and mother shall inherit the estate of the child in equal moieties, as tenants in common, and in fee simple if there be no brothers and sisters, and no issue. And if either parent be dead, the estate falls upon the survivor; and if both be dead, upon the right heirs of both, as tenants in common. If the estate came to the intestate by gift from the father, or by gift, devise or descent from the ancestors of the father, then the father shall take, only, if living, in preference to the mother; and if the estate came by gift from the mother, or by gift, devise or descent from the ancestors of the mother, the mother takes, only, if living, in preference to the father: Nic. Sup., 147. These provisions were, in the main, carried into the Code, which provides, that, without reference to the source of intestate's title, in such case, if there be no brothers or sisters, or other issue, and either parent be living, then the inheritance falls upon such living parent. This, unquestionably, means that one or the other parent

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surviving the child, takes the estate in any and all events, and without reference to the question of transmission; or, in the words of the statute, without reference to the source of the intestate's title. But if the estate comes through the one or the other line, the parent representing the line of transmission, "if living," takes in preference to the other. It will be observed that no express provision is made for the case like this, where the parent representing the line of transmission is dead. We only find that such parent, "if living," shall take the estate, "in preference to the other." But the act of 1842, c. 171, under which the rights of these parties attached, is not inconsistent with or repugnant to the Code. Therefore, they may be construed together. The words, "if living, in preference to the other," are to be found, also, in the act of 1842, c. 171, in regard to the line of transmission; and these words furnished a key, by which the proper interpretation of this question of descent can not be mistaken. These words, that the parent from whom or whose ancestors the land came, shall, if living, inherit the same, in preference to the other parent, must be coupled with the first provision, that without reference to the source of the intestate's title, if in such case there be no issue, nor brothers or sisters or their issue, and either parent be living, then the estate will go to such parent. Taken and construed together, as the rules of law require that they should be, they may be resolved into the words, that, in such case, if one parent be dead, the other parent may inherit; but if both be living, that one shall be preferred who represents the line through which the estate has been transmitted. If both parents

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be dead, then the transmitting line is again preferred. We have no hesitation in holding, therefore, that the mother of Jasper McCracken, upon his death intestate, inherited his lands in fee simple absolute, and upon her death intestate, that the inheritance has fallen upon her right heirs.

The decree of the Chancellor is affirmed, and the bill dismissed.

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Adm'r, *et als.*

1. AGENCY. *Attorney, to take judgment, may receive payment. Secret instructions.* The power of an attorney to sue upon a bill of exchange implies a power to collect or receive the proceeds; and instructions restricting his power to taking judgment are not admissible in evidence, unless they are shown to have been brought to the knowledge of the payor before the payment is made.
2. SAME. *Delegation of power. Payment.* An attorney to whom a bill of exchange is sent for collection, may entrust it to another, a payment to whom will be valid.
3. EVIDENCE. *Means of payment, as relevant to payment.* On a question whether a certain payment was made, it is admissible for the payor to prove that he had the means to pay, as a circumstance; as that he sold certain property to raise the money to pay the particular debt.
4. SAME. *Declarations to explain acts.* To admit the statement of the payor at the time of the sale and receipt of money, as to the purpose for which he was raising the money, is not error.
5. SAME. *Declarations in presence of agents of adverse party.* Where the payor in the presence of the payee's agent, who was receiving the money, borrowed money to make up a deficiency, what he said at the time in the presence of the agent is admissible, as a circumstance going to show the payment.

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6. **SAME.** *Proof of payment. What admissible.* On a suit upon two bills of exchange, as lost bills, these facts were held admissible to prove payment: that a party to the bills of exchange, which were then in the hands of a particular person, after circumstances tending to show a payment of money, came out of a room, and in the presence of the holder, with two bills of exchange in his hand, spoke of them as paid; showing them to witness, who saw that they were bills, and that one of the bills had on it the name of a party whose interest the witness was looking after, and the other had another name, which names agreed with those on the bills in question; there being no proof that there were any other bills but those in question made by the parties, or in the hands of the person to whom the payment was alleged to have been made.
7. **SAME.** *Same.* The subsequent possession of bills of exchange by the payor, somewhat vaguely described, and of their destruction by burning, were also held to be circumstances proper to be left to the jury.
8. **EVIDENCE.** *Testimony of deceased witness.* A witness called to prove the testimony of a deceased witness on a former trial, is competent to testify, if he remembers the substance of what the deceased witness swore on a particular subject, though he does not profess to remember his testimony on other points.
9. **ERROR.** *Evidence of established or immaterial facts.* The admission of incompetent evidence to prove facts otherwise fully established, and uncontroverted, is not a ground of reversal. So of the admission of immaterial facts not calculated to affect the jury.

FROM LINCOLN.

Appeal from the Circuit Court of Lincoln County,
N. A. PATTERSON, J., presiding.

TURNEY, J., having been of counsel, did not sit in this case.

COLYAR, MARKS & NEWMAN, for the plaintiff, as to acts and declarations of agent, cited: 4 Yer., 165; 11 Hum., 67; 2 Sneed, 73; 3 Head, 588; 2 Swan, 260; 1 Greenl. Ev., 113; Sto. Agency, §§ 134 to 137, and n. 1 to § 136. As to power of agents: Sto. Agency, §§ 17, 126, 133; 2 Kent,

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9th ed., top p. 835, 6. Power of agent to delegate: Sto. Agency, § 12 to 14; 2 Kent, top 855, 6, and n. a; 1 Esp. N. P. C., 115; *Yates v. Freckleton*, Doug., 623; 3 Phil. Ev., 3rd ed., top p. 131, and n. 8. Special agency may be proved by agent; 1 Greenl. Ev., § 416.

Brief of TURNEY, J., and DISMUKES, presented by the latter, cited, upon special instructions to agents: *Hoskins v. Johnson*, 5 Sneed, 469; *Ezell v. Franklin*, 1 Sneed, 497; *Walker v. Skipwith*, Meigs R., 502, 510. Liability of agent for act of sub-agent: *Harold v. Gillespie*, 7 Hum., 57.

FREEMAN, J., delivered the opinion of the Court.

In 1867, suit was brought in the Circuit Court of Lincoln County, by plaintiff, against Thomas J. Massey, administrator of John B. Massey, deceased, M. D. Hampton, Jacob Anthony, and J. G. Woods, upon a lost bill of exchange, drawn by John R. Massey, and indorsed by the other defendants, for \$1,600. The bill was drawn on S. O. Nelson & Co., New Orleans, at four months, and dated February 28, 1861.

Defendants pleaded *non assumpsit* and payment, and the indorsers put in the further plea of want of notice of protest.

Upon the trial, verdict and judgment were for the defendants, and the plaintiff appealed in error to this Court.

The record shows that plaintiff held another bill of exchange on Massey, indorsed by the same parties, except Anthony, payable in Mobile, Ala., at four months, and dated November 1, 1860, upon which a balance of \$19.35 was still due in March 1861, and that these two bills were

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placed in the hands of Lester & Ward, attorneys at law, of Pulaski, Tenn., by the plaintiffs, for collection.

In January, 1862, Lester & Ward sent them to the law firm of Bright & Bright, at Fayetteville, with instructions to bring suit upon them. In 1862, Bright & Bright left the State temporarily, and turned over their office and papers, including the bills of exchange, to Stephens, a young lawyer of Fayetteville; and plaintiff insisted and offered to prove that Bright & Bright were instructed by Lester & Ward to take judgment, but not to collect. This was objected to by defendants, and excluded by the Court.

D. P. Holman, a witness for the defendants, testifies that, in the latter part of 1862, or first part of 1863, he was present looking after the interest of Anthony, one of the indorsers of the bill sued on, when John R. Massey, Stephens, and a third person, whom he did not know, went into a room together. Massey came out, and in the presence of Stephens, asked witness to loan him \$20 in State Bank money, to pay the balance on a bill of exchange. Witness loaned him the money. That when witness, Stephens, Massey, and the third person, all came out together, Massey had the bills, and showed them to witness, and said: "now I reckon your pains will be easy;" and he, Massey, then went and showed the bills to Woods. Witness looked at the bills, and one of them had more names than the other; Anthony's name was on one, and Woods' name on both of them.

This testimony was objected to by plaintiff, but the objection was overruled by the Court, and the testimony allowed to go to the jury. And it is insisted in argument, that it was improperly admitted, because it was irrelevant,

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and did not identify either of the bills as being the one sued on in this action.

We do not think this objection is well taken. While it is a well established rule that evidence must correspond with the allegations, and be confined to the points in issue in the cause, it is not necessary that it should bear directly upon the issue. It is admissible, if it tends to prove the issue, or constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it. 1. Green, Ev., § 51, a.

So it is admissible to show any facts in a case, from which a reasonable inference as to the principal facts, or matter in dispute, may be drawn. Tested by these rules, we are of opinion that the evidence objected to was not inadmissible upon the ground of its irrelevancy.

But it is further insisted, that, even if the fact of payment had been satisfactorily shown by competent evidence to have been made to Stephens, that it could not avail defendants, as Stephens had no authority to receive payment of the bill.

It is a general maxim, applicable alike to general and special agencies, that when power is conferred to do an act, or to accomplish a particular purpose, the authority given carries with it the right to use such means and measures as are appropriate to its performance. An agency to do an act necessarily embraces all the incidents required to render such act complete.

So it has been held by this Court, that an agency to sell includes an agency to receive payment; and that where a party appointed an agent to sell merchandise, without power to receive payment, but with express instructions

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not to receive payment, the purchaser might pay the price of the merchandise to the agent, without being affected by the principal's secret instructions to him, unless said instructions were communicated to the purchaser before the payment: 5 Sneed, 469.

So also, in 5 Hum., 365, it was held that an agent to sell horses for the best price he could get, and return the proceeds to his principal, had power to sell not only for cash, but to sell upon credit, if such was the course of trade in the market. We hold, therefore, that the power to sue for a debt implies and carries with it the power to collect it; and that the attorney in whose hands it may have been originally placed for collection, might place such claims in the hands of other attorneys for the purpose of bringing suit, where it was impracticable or inconvenient for the original attorneys to attend personally to the case; and the attorneys might use such suitable means or agencies as they saw fit to employ, if such was the usage and custom, or if it was understood by the parties to be the mode in which the business would or might be conducted. And this right might also be well sustained upon the implied authority of the agent to use all mediate powers, and appropriate measures for the execution of the power conferred. And no secret instructions, to any of the attorneys, not communicated to the debtor, would affect the validity of his payment of the debt to the agent.

It is, therefore, not strictly correct to say that a special agent can exercise no power, not expressly conferred; for to almost all granted powers, there are others incident, reasonably to be implied from the nature of the particular business.

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The testimony of Todd, as to the bills of exchange that Massey showed him at the house of Kercheval, and his description of them, and that they were burnt, we think was properly admitted by the Court, to be considered of by the jury, in connection with the other testimony in the cause.

So the testimony of Wilson, that he had paid Massey \$1,600, in the latter part of 1862 or first of 1863, for a negro, was competent, as showing his means to pay the debt sued on. This fact, of itself, is, of course, not proof of payment; still, it may constitute a link in the chain of proof, and it was, therefore, properly admitted to go to the jury.

The admission of the testimony of Holman, that Massey, in the presence of Stephens, and before he came out of the room with the bills of exchange, asked witness to loan him \$20, in State Bank money, to pay the balance on a bill of exchange, and that he loaned him the money, was also objected to by plaintiffs. We do not think, in view of the circumstances then existing, that the admission of this evidence was erroneous. It may be inferred that some transactions were being had at the time between Massey and Stephens and the third person, and that in furtherance of that transaction, and in the presence of Stephens, the application to borrow the \$20 was made to witness. It is the province of the jury to determine, from all the evidence in the case, whether what transpired had any connection with the payment of the bill sued on.

Exceptions were also taken to the testimony of Cowan and McElroy as to the testimony of James R. Bright,

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deceased, who was examined upon a former trial of this cause. Each of said witnesses stated that he could not detail all the testimony of Bright, but could state the substance of what he said in relation to turning over the papers of his office to Stephens, which they proceed to detail. The objection taken to this evidence was, that the witness could not detail the substance of the whole testimony. The rule upon this subject has been much relaxed. Formerly, a witness was required to repeat the precise words of the deceased witness. Now, however, it is only required that the substance of such testimony shall be given; and it is not even required that he should be able to give the substance of the whole testimony, but only the substance of what was said on the particular subject which he is called to prove. 1 Greenl. Ev., § 165; 10 Hum., 479. It is fairly to be inferred, from the examination of these two witnesses, that they were called upon to prove only the testimony of the deceased witness in relation to his turning over the papers of Bright & Bright, he being a member of said firm, to Stephens; and this they both say they are able to state in substance, and proceed to do so. There was, therefore, no error in admitting their testimony on this point.

Defendants were allowed, against the objection of the plaintiffs, to prove by the witness, Holman, that John R. Bright told him that he would leave the bills of exchange with Stephens, a young attorney in the town of Fayetteville. This evidence being the mere declaration of Bright of an intention to do an act in future, was not strictly admissible; but it having been proved by two witnesses, that Bright had stated, upon his examination

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in the former trial, that he had left them with Stephens, and there being no conflict in the evidence upon this point, we can see that the plaintiff was not prejudiced by it, and we can not reverse for this error.

The testimony of Cowan was also irrelevant, and should have been rejected. He stated that Massey applied to him to borrow \$1,000, to pay off a bill in Pulaski, but he did not get the money; and afterwards, Massey told him he had raised the money in another manner. Nothing in this transaction could raise any presumption of the payment of the bills; and although this testimony was improperly admitted, it was not calculated to mislead the jury, and could not have influenced their verdict.

Charles Wilson was allowed to testify, against the objection of plaintiff, that Massey sold him a negro in the latter part of 1862, or early part of 1863, for \$1,600, to pay a bill, as he understood from him, in the hands of Bright & Bright. It was legitimate for defendants to show that money had been raised about the time of the alleged payment of the bills, and also to show for what purpose it was raised. "Where a party does any act material to be understood, his declarations, made at the time of the transaction, and expressive of its character, motive or object, are regarded as verbal acts, indicating a present purpose and intention; and are, therefore, admitted in evidence, like any other material facts." 1 Greenl. Ev., § 108. "So, in a suit for enticing away a servant, his declarations at the time of leaving his master are admissible as part of the *res gestæ*, to show the motive of his departure." *Ibid*, § 108, note 2. We, therefore, hold

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that, in the admission of this testimony there was no error.

Upon a careful examination of the whole case, we are satisfied that no material errors have been committed to the prejudice of the plaintiff; and we affirm the judgment of the Circuit Court.

LEWIS W. MCCARTNEY v. JAMES WADE et als.

1. DURESS. *Confederate notes taken under.* A party receiving a payment in Confederate money, under the pressure of threats of immediate military arrest, which, under the circumstances existing, could, and probably would have been executed, will be relieved from the payment.
2. SAME. *Declarations made under.* Declarations that he had acted voluntarily, made by the party while the circumstances still existed, and properly attributable to the fear and apprehension under which he previously acted, will not be allowed to preclude the right of the party to relief.
3. SAME. *Account for Confederate notes used.* A party taking Confederate Treasury notes, and using them, must account for the amount realized for them.
4. SAME. *Same. Decree against borrower.* Where a complainant on whom Confederate money had been imposed by duress, loaned it to another, and that other used it in payment of his debts, and made no complaint of it, all the parties being before the Court, the decree was entered in favor of the complainant against the party to whom he had loaned the money, and as to so much the payment to complainant was held good.
5. LOAN. *Without interest. Interest computed from bringing of suit.* A borrower of Confederate notes, on an undertaking to pay after the war, in

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the currency which should then be in use, without interest, will be charged interest from the commencement of the suit against him.

FROM WILSON.

Appeal from the Chancery Court at Lebanon, before
JOHN P. STEELE, Ch.

STOKES & SON, for complainant, cited *Walker v. Walker*, 4 Cold., 308.

TARVER & GOLLADAY, for defendants, cited *Blair v. Coffman*, 2 Tenn., 176; *Knuckolls v. Lea*, 10 Hum., 577; 3 P. Wms., 294, and *n. c.*

NELSON, J., delivered the opinion of the Court.

Although there is some conflict in the evidence in this case, we are satisfied from the proof, that, however successful the complainant may have been in dissembling his sentiments for a time, he was, during the late civil war, a Union man; that the defendants were fully identified, in sentiment and feeling, with the late rebellion; that complainant held a note on defendants, Wade and Love, for about \$200, bearing date, 6th March, 1862; and that he surrendered this note under duress, as charged in his bill. It seems that, acting under this influence, complainant received Confederate Treasury notes in payment, after having refused, on several occasions, to do so, upon the assurance of W. L. Gregg, now deceased, that he would borrow one hundred and fifty dollars of the amount; that he took the note of said Gregg for that sum, with Robert A. Gregg as security, bearing

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date the 30th March, 1863; that he sued the security for said amount, before a Justice; and having only recovered eighty-seven dollars, appealed to the Circuit Court of Wilson, where the same was pending when this bill was filed. Wade, the original debtor, was, at the time of this pretended payment, a soldier in the Confederate army, absent in the service; and Love, who was a joint maker of the note with him, and Mrs. Wade, acted in concert in compelling him to take the Confederate notes.

Several persons living in the same county in which the parties resided, had been previously arrested by the Confederate military authorities for refusing to receive Confederate Treasury notes; and among others, one witness states that in January, 1863, he was arrested by a squad of ten or more men, and taken some seventy-five or eighty miles, to General Morgan's headquarters, at McMinnville, where he was released, on condition that he would agree to take Confederate money in payment of all debts, and return home and inform the people that they would be compelled to receive it. General Morgan told the witness that he, Morgan, was acting under the orders of General Bragg, and that the penalty for refusing to take Confederate money would be a fine of five hundred dollars and compulsory service in the army, or imprisonment.

Witness, after his return home, gave publicity to this information, at a public sale, when about two hundred persons were present; and we have no doubt, from this and other evidence contained in the record, that complainant was fully informed of the military order before

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he surrendered the note. One witness states that defendant, Love, in the course of the conversations which preceded the surrender of the note, said that if it was his own debt, he would not force the Confederate money on complainant, but that he was acting for Mrs. Wade. He said, further, that he would not be surprised if the cavalry should get after him. Love then left, for the purpose of consulting with Mrs. Wade, and while he was gone, W. L. Gregg said that complainant would be arrested and taken off if he did not take it. Before starting to Mrs. Wade's, Love had requested complainant to receive the Confederate money; and when complainant's daughter observed to him that he ought to pay her father in as good money as he had loaned to him, he replied, in complainant's hearing, that he had told the soldier from whom he received it that he did not expect complainant would take it, and that the soldier had answered, "All you have got to do is to let me know it, and I will make him take it." Love returned, and stated to complainant, that Mrs. Wade, who is his daughter, said that if he did not take the money, she would report him before night. Another witness states that while Love was gone to consult Mrs. Wade, Gregg stated to complainant, that "he had better take the money; for Love had said that he would have him reported, sent to Morgan, and bound in a bond for \$600, and imprisoned five months, if he did not take it, and he might be killed, as he was a Union man." Complainant then agreed to receive it, and sent his son and Gregg to Mrs. Wade with the note.

On the day the note was surrendered, or the succeed-

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ing day, Mrs. Wade, who had paid the Confederate notes to complainant's son, declared to a witness, that if her uncle, the complainant, had not taken the Confederate money, "she would have had Morgan's men on him before night." Love, soon afterwards, declared that complainant "hated to take Confederate money, pretty bad; that he was such a Lincolnite, and hated Confed. so bad, he loved to pack it on him." One of defendant's witnesses stated, upon cross-examination, and without objection, that complainant said, soon after he surrendered the note, that he "believed he would have been arrested and taken off if he had not received the Confederate money." Mrs. Wade, who is the sister of complainant, and of James McCartney, another witness, compelled McCartney, the witness, to take Confederate money in payment of a debt due him from her husband, at about the same time when the note spoken of in this case was surrendered; and the witness states in substance, that he would not have taken it but from fear, and "because the woods was full of cavalry." Love, in speaking to another witness in regard to the surrender of the note, said that, "if complainant cut up at that, he, the witness, had another dose for him." It further appears in evidence, that the "Confederate money" was very greatly below par; that complainant refused, repeatedly, to receive it; that he finally consented to do so, only upon the assurance of Gregg that he had use for it, and would borrow a part of it, and under the pressure of immediate threats, which, under the circumstances then existing, could and probably would have been immediately carried into execution.

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It is not necessary, in the view of a court of equity, to show that a party acted under the influence of extreme terror in making a contract. If he acted under threats or apprehensions, short of duress, but under such circumstances as to show that he was not a free agent, and was unable to protect himself, the contract will be annulled. See 1 Story Eq., § 239.

The complainant did not act under a vague and general apprehension of giving offense to the Confederate authorities, which may have been common to all the citizens, but with knowledge that a strong military order had been issued, and enforced by arrests in the section of country where he lived, and under the immediate pressure of personal threats, and a zealous and active combination against him, which he was powerless to resist. It was not necessary that he should express his fears at the time, as the expression of them might have brought about an immediate arrest.

Duress, or the want of free agency, like any other fact, may be established by circumstantial testimony; and no importance can be attached to the complainant's declarations, made soon after the contract, and while the military order and the power to enforce it were still in existence, in the presence and hearing of persons from whom he differed in opinion, to the effect that he had acted voluntarily, as it may be fairly inferred, from all the circumstances, that these declarations were made to allay suspicion, and under the same influences of fear and apprehension under which he had previously acted; and there is no evidence in the record to show that his mind had been disabused of these impressions when

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the declarations were made. There are slight discrepancies and apparent contradictions in the evidence of some of the witnesses, but not more than are usual in all cases of a controverted nature. They are not sufficient to show that any witness in the case has committed perjury, and furnish nothing more than an illustration of "substantial truth, with circumstantial variety."

The complainant is, therefore, entitled to a decree declaring that the note was surrendered under duress; but is not entitled to the specific relief granted by the Chancellor, for the reason that he did not return, or offer to return, the Confederate notes. It is in proof that, on the day after they were received by complainant, W. L. Gregg borrowed one hundred and fifty dollars of the notes which had been paid, but refused to pay interest, and executed his note, with security, payable one day after date, without interest. The note is not in evidence, and no copy of it is contained in the record; but it is in proof that Gregg desired to obtain the loan, to enable him to pay a debt he owed to Isaac Gibson. One witness states that he promised to pay complainant "in the currency of the country at the close of the war, and in gold and silver, if that was the currency of the country;" and declared that the money would answer him the same purpose as gold and silver.

Another witness says that Gregg remarked, he would take the Confederate money and risk it, and another witness states that complainant said Gregg was to pay the note "in the currency of the country, when it was paid."

Gibson proves that, in the Spring of 1863, Gregg paid him one hundred dollars in Confederate money; and from

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the fact that he never made any complaint in regard to the transaction, taken in connection with his previous declarations, it may be inferred that he did not sustain the slightest loss upon the Confederate notes.

It was decided by the Supreme Court of the United States, in *Thorington v. Smith*, 8 Wal., 13, that contracts between the inhabitants of the Confederate States, made during the late civil war, must be interpreted and enforced with reference to the condition of things created by the insurgent governing power; and that where a note was executed, payable in dollars, parol proof may be admitted to show the sense in which the word "dollars" was used, and that if "Confederate dollars" were meant, the plaintiff could only recover their value at the time and place of the contract.

We are, therefore, of the opinion, that, as W. L. Gregg realized the full value of the Confederate money he borrowed, and promised to pay in the currency that might prevail at the close of the war, his administrator, and Robert A. Gregg, the security, should be required to pay the amount of said note, with interest from the time the suit at law was commenced. And as all the facts are substantially stated in the bill, and all the parties were brought before the Court, and complete justice can be done in this case, on the prayer for discovery and general relief, without the further prosecution of the suit at law; and as the evidence shows that the complainant did not return the Confederate notes retained by him; let a decree be pronounced in his favor, against James Wade and Armistead A. Love, for the amount due on their note to complainant, after deducting therefrom the sum of one

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hundred and fifty dollars, and the actual value of the Confederate notes retained by complainant at the time when the same were received, as to which the Master will state an account and make a report during the present term. Decree, further, that complainant recover of the administrator of W. L. Gregg and Robert A. Gregg, the security, the sum of one hundred and fifty dollars, with interest thereon from the commencement of the suit at law; that the suit at law shall be dismissed at their cost; and that the costs of this cause, in this court and the court below, shall be paid, one-half by the said Wade and Love, and the other half by said administrator and his security, but to be paid by said administrator, if the same can be collected, out of any assets in his hands, and if not, then by said surety.

The Chancellor's decree will be modified accordingly.

WM. BLACKBURN v. ELI VICK.

1. *CONTESTED ELECTION. Of Revenue Collector. Jurisdiction of.* In the absence of any specific provision as to the jurisdiction of a contested election, a court having the power to induct an officer, has the power to determine the validity and truth of the return of his election. The County Court having the power to induct a Revenue Collector, is the proper jurisdiction before which a contested election lies as to that office, there being no express provision for a contest elsewhere.
2. *SAME. The remedy, when.* If a party take an office under color of an election, the only remedy for the party who is really elected is by a contest.
3. *SAME. Mode of proceeding. Statement and issue.* The contestant should file, after due notice to the adverse party, in the court where the con-

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test is to be made, a clear statement of the grounds on which he proposes to contest the election of his opponent, presenting grounds for an issue of law or fact. To this the defendant should rep'y, so as to raise a question of law or fact.

4. SAME. *Same.* It is the duty of the Circuit Court, on an appeal in such case from the County Court, to see that proper issues are made up, hear the evidence, and determine the rights of the claimants to the office in controversy.
5. SAME. *To be tried on the merits.* A judgment against a contestant, on appeal from the County to the Circuit Court, without trial on the merits, that he pay all the costs but the costs of the defendant's witnesses, is erroneous, where the Court has jurisdiction of the contest.

Case cited: *Boring v. Griffith*, 1 Heis., 456.

FROM DE KALB.

The proceedings in this case came by appeal from the County Court to the Circuit Court, where the judgment complained of was rendered by McCLAIN, J.

M. M. BRIEN, SR., for the contestant, insisted that the County Court had the jurisdiction to try the contest; citing the Code, 817, 888, 492; Act of 1859, 60.

J. H. & R. C. NESMITH, with him, cited Hist. of a L. S., 513; 2 Sneed, 670.

W. G. CROWLEY, for defendant, insisted that the jurisdiction was in the Circuit Court; citing Code, 4225, 3409 to 3411, 3430. Constitution of 1834, Art. 6, sec. 8, gives the Legislature power to define the jurisdiction of Courts, but it has not conferred this power on the County Court: Code, 888. On costs, cited Code, 3215.

FREEMAN, J., delivered the opinion of the Court.

This is a case of contested election for office of Revenue Collector of DeKalb county, in the year 1868.

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The only facts necessary to be stated in this opinion, are: That plaintiff and defendant were both candidates for the office at the March election, 1868; that upon the returns, the Coroner gave Vick a certificate of election, he having received a majority of two votes, as appeared by return of the result, as made by the officers holding the election. Thereupon, plaintiff, Blackburn, gave notice, which was duly served on Vick, that on the 6th day of April, 1868, before the County Court of DeKalb county, said notice specifying the grounds of the contest, he would contest said election. On said 6th day of April, Blackburn appeared before the County Court, and filed a paper, which may be treated as the pleading on which the contest was to be made, in which he resists the inducting of Vick into the office, and, for reasons therein stated, claims the office for himself. We need not go into the sufficiency of the allegations thus made, as the case must be decided here upon another question, perhaps the only one properly before us.

The defendant, Vick, filed various pleas, to which there were replications, and after this, demurrers, and various other proceedings, sufficient to involve the record in almost inextricable confusion.

Suffice it to say, that in the midst of the various pleas, demurrers, motions and exceptions to the action of the Court upon these pleadings, the Court proceeded to induct defendant, Vick, into the office, by administering to him the oath of office, and taking bond as required by law. The record states, however, "that the Court reserves the question of the merits of the contest for further consideration." To all of which plaintiff excepted.

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After various motions, and action on a demurrer, Blackburn was ordered to give security for costs by the next term of the court; the defendant was allowed to plead or answer within six days; and thereupon the cause was continued till next term of the County Court. Bond was given by Blackburn at the May Term, as required by the Court; and on the 6th day of May, the case seems to have been heard, and after argument of counsel, as the record states, "for want of time to consider of their verdict, the court adjourned" till next day. On that day the court met and gave a judgment, as follows: "It was ordered, adjudged, and decreed by the Court, that Eli Vick was, on the first Saturday in March, duly and constitutionally elected to the office of Revenue Collector for DeKalb County, for the term of two years." Judgment was rendered against Blackburn for costs, and thereupon Blackburn appealed to the Circuit Court.

This appeal came on to be heard in the Circuit Court; when, upon argument of the case, "the Court was of the opinion that the County Court had no jurisdiction of the contest," and sustained the defendant's motion to dismiss the appeal. The Court gave judgment against Blackburn for all costs, but afterward, on motion, retaxed the costs, and gave judgment for all costs "incident to the summons and attendance of witnesses in the Circuit Court, in behalf of defendant, Vick, against the said Vick, and plaintiff to pay all the balance of the costs in the Circuit Court, and all costs in the County Court." To this judgment, dismissing the case for want of jurisdiction in the County Court, plaintiff, Blackburn, ex-

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cepts, and prays an appeal to this Court, and also tenders exceptions to the taxation of the costs.

The simple question presented for our consideration, is, did the Circuit Court err in its judgment, dismissing the appeal for want of jurisdiction in the County Court?

We find no provision made for contesting the election of Revenue Collector, either by the Code, or by the act of 1859, c. 9, p. 6, providing for their election by the people, instead of by the County Court as was provided by the Code, 817, nor in any subsequent act of the Legislature. We must, then, either assume that no such contest was to be had by our law, or that some court had jurisdiction to try such contest. That such an election before the people is a proper subject of contest, we can not doubt. The office is one for which any qualified citizen may be a candidate, and the right to be a candidate necessarily involves the right to the office, if he be elected; and the right to assert, prove and maintain the right to the office, on such election, would follow, as a matter of course. If, however, another party may take the office, regardless of the question of who was in fact legally elected, then, unless his right thereto can be contested, and tried before the tribunals of the country, there is no remedy for the party who may have been really elected and entitled to the office. He has a right, but no remedy for its infringement.

What court has jurisdiction, in this case, to settle the question as to who was elected, and entitled to be inducted into the office?

The act of 1859, ch. 9, after providing, in sec. 1, that the election of this officer shall be "by the qualified

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voters" of the county, and he shall hold his office for two years from the date of his qualification, in sec. 4 enacts, "that the Revenue Collectors *elected* under the provisions of this act, shall, at the first County Court after their election, enter into bonds, take the oath, be subject to the penalties, etc., that are now provided by law in reference to Revenue Collectors, and have the same powers as Revenue Collectors now have to enforce the collection of revenue." By this act, it is clearly made the duty of the County Court to induct the party *elected* Revenue Collector under this act into his office, administer the official oath, and take his bond as required by law. No other court having jurisdiction given it to try the question of who is elected, and the County Court being required only to induct into office, the Revenue Collectors *elected*, must if the question be contested, of necessity be the tribunal before whom the contest is to be made. The election of the applicant is the condition precedent to his induction into office. The County Court, being charged with the duty of inducting the party elected into office, must also have the right to investigate the question, and see if he has been "elected under the provisions of this act," that is, by the "qualified voters of the county," as provided in the first section of the act. We hold, then, that the County Court had jurisdiction to try this contest, and that the Circuit Judge dismissed the appeal improperly.

As no form is given for the proceeding in case of contested elections, we held, at Knoxville, in a late case, that the court before which the contest was held might regulate the practice in such cases, provided no fundamental

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principle was violated; that the court should see that the party had his day in court, and due notice of the proceedings, and if the pleadings or allegations of the parties were not sufficient to present the questions involved, the court having jurisdiction of the cause should order such amendments as would present the matters before it for its adjudication. *Boring v. Griffith*, 1 Heis., 456.

We now add to the above, that, by analogy to the general rules of law, we hold that the party making this contest should, after due notice to the opposite party, file in the court where the contest is to be made a clear statement of the grounds on which he proposes to contest the election of his opponent, so as to make an issue, or present the grounds for one, either of law or of fact; to which defendant should make his reply, either raising a question of law or of fact; which issues should be decided by the Court, either upon consideration of the question of law raised, if it be such, or of the proof in the case, if it be one of fact.

In this case, allegations were presented by plaintiff, and answers filed to them by way of pleas, but we forbear to express an opinion on their sufficiency in law, as grounds on which the plaintiff may maintain his case, the question not being properly before us, under the facts of this case presented in the record.

The case was before the Circuit Court by appeal, to be tried *de novo*, and the Court should have seen that the proper issues were made, heard the evidence, and decided the rights of the claimants to the office in controversy.

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The judgment for costs complained of was given as the result of the judgment dismissing the case for want of jurisdiction. It follows that it was erroneous, if the Court improperly dismissed the case in the Circuit Court. We hold the Court erred in its judgment dismissing the appeal. Reverse the judgment, and remand the case to be tried in the Circuit Court, on the issues presented, or on such as may be presented, on proper amendments, if deemed necessary.

JOHN W. MARTIN *et als.* v. R. I. TURNER.

1. CHANCERY SALE. *Estoppel as to parties petitioning for the sale. Relief as to whom.* On a bill filed by heirs to set aside a sale of land, made under the order of a County Court, upon application of two of the heirs as administrators of the estate, they, with others, being of age, and the others being minors, the Court hold that they would be bound to repel the administrators if they sued alone; but, as the others are not culpable, the Court are bound to declare the sale void *in toto*.
2. SAME. *Confederate Treasury Notes. Applied to debts. Substitution. Value of Confederate Treasury Notes.* The price being paid in Confederate Treasury notes, which were applied in payment of the debts of the estate, it was held that the purchaser should be reimbursed, the value of the currency paid, estimated in U. S. Treasury notes, with interest.
3. SAME. *Price a lien. Account, how adjusted. Time to pay in, money.* The value so charged, with meliorations charged and rents credited, is held to be a lien on the land, and sale ordered for their satisfaction, unless paid in a reasonable time.
4. SAME. *Effect of estoppel as to petitioner.* The surplus, after paying charges decreed to the heirs, excluding the two administrators.

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5. SAME. *Petitioners to pay costs.* The administrators personally charged with all costs.

FROM FRANKLIN.

Appeal from the Chancery Court at Winchester, before JOHN P. STEELE, Ch.

A. S. MARKS and M. F. TURNEY, for complainants, cited the Code, 2337, 2338, 2339, 2388; Act of 1833, c. 36; *Reid v. Huff*, 9 Hum., 352; *Parchman v. Charlton*, 1 Cold., 383; *Whitmore v. Johnson*, 10 Hum., 610; 1 Cold., 552; 11 Hum., 389, 448, 488; 1 Head, 128; 1 Swan, 75; *Swan v. Newman*, 3 Head, 288; *Curd v. Bonner*, 4 Cold., 632; *Rucker v. Moore*, 1 Heis., 726.

JOHN M. BRIGHT and JOHN FRIZZELL, for defendants, relied on the deficiencies in the record, and cited *Brown v. Wright*, 4 Yer., 57; *Burton v. Pettybone*, 5 Yer., 443. Should have been supplied; 7 Hum., 576; Code, 3907; 3 King's Dig., p. 414, §§ 9326, 9327. On sales by decree, they cited *Swan v. Newman*, 3 Head, 288; *Wilcox v. Cannon*, 1 Cold., 370; 1 King's Dig., 2817; Lead., Cas. Eq., 75, 76, and cases cited; *Wheatley v. Hurvey*, 1 Swan, 484; *Thomas v. Lewis*, 3 Hum., 29. Powers of County Court, Code, 4201, 4203, 4204, 2267; Hist. of L. S., p. 503, § 705, s. 8.

Mr. FRIZZELL cited, in addition to the above, 8 Hum., 717; 2 Head, 276; as to the administrators, 8 Hum., 142.

The decree entered in this case provided that,

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as to the Confederate notes received, which paid debts at par, they should be allowed the defendant at that rate; as to the remainder, at the current value.

TURNEY, J., having been of counsel, did not sit in this case.

NICHOLSON, C. J., delivered the opinion of the Court.

This is an application, by the heirs of N. R. Martin, deceased, to set aside a sale of a house and lot in Winchester, sold under an order of the County Court of Franklin county, in 1863, and purchased by R. J. Turner.

It appears that, in 1860, John W. and N. R. Martin, two of the children of N. R. Martin, deceased, being administrators of his estate, petitioned the County Court for the sale of certain lots in Winchester; but, as the transcript from the County Court contains no petition, we are unable to find out for what cause the sale was desired, whether for partition, or for the payment of debts. Nor do we see by the transcript, who of the children joined as petitioners, or who were defendants. We see that three of the children were minors, and that the Court appointed a regular guardian for them, and a guardian *ad litem*; but we see no process that was ever served on them, or any of the other children, nor is there any answer, either by the minors or their guardian, or any of the children. Yet the County Court ordered the Clerk, after having taken proof and reported that the *minimum* value of the lot was \$2,500, to sell the same on a credit of one, two and three years. About December, 1860, he

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sold the property for \$2,510, to E. Martin, and reported to the Court the sale of the lot, but closed his report by stating that the sale was null and void by consent of all the parties, but it does not appear who were the parties who gave the consent. However, the Court confirmed the report, and ordered the administrator to pay the costs.

The matter rested so until April, 1863, when the County Court resumed the case, and say: "It now appearing to the Court that it is to the interest of the parties to sell the property for cash," the administrator having requested this to be done, as appears by the report, the sale was accordingly ordered. The report of the Clerk, alluded to, is not found in the record. The property is ordered to be sold for cash, and the money to be paid over to the administrator to pay debts.

The house and lot was sold on the 4th of May, 1863, and bid off by defendant, Turner, for \$2,510, in Confederate money; the sale being made under proclamation of the crier and by order of the administrators, payable in that sort of currency. The Clerk reported the sale to the Court at its May Term, 1863, when, on the 5th day of May, the report was confirmed; and the Clerk ordered, after paying costs, to pay the balance over to the administrators, and to execute a deed to Turner.

On the 4th of May, 1863, the Clerk had a settlement with the administrators, and reported to the Court, on the 7th of May, that there had come to their hands \$3,128, and that they had paid out \$4,441, leaving the estate indebted to them \$1,312, which report was confirmed. On the 5th of June, the administrators receipted

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to the Clerk for \$1,312, in satisfaction of their claim against the estate, and for \$1,134, which they received as administrators; thus disposing of the \$2,510, for which the house and lot was sold.

These are the facts which we gather from the bill, answer and proof.

The complainants are the children and heirs of N. R. Martin, deceased, two of them being the administrators, who engineered the proceedings in the County Court, obtained a sale of the house and lot, directed it to be sold for cash and in Confederate money, and received one-half of the money to satisfy disbursements they had made for the estate, and the other half for distribution or payment of debts.

The complainants insist that the proceedings in the County Court were all void, that the Confederate money paid by Turner was worthless, that he got no title; and ask that the County Court proceedings be declared void; that Turner's deed be annulled, and that the house and lot be decreed to them, with all proper rents and profits.

It is manifest that the County Court had no jurisdiction to order the sale of the house and lot, if the transcript in the record is to be taken as containing all the proceedings in the case. There is not enough to show that the Court had jurisdiction of the person, or of the subject matter. But, while this is true, we should feel bound to repel the two administrators from the relief sought, on account of the part they bore in procuring the illegal orders and sales of the property, if they were the only complainants. But there is nothing in the record which implicates the other complainants,

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and especially those who were minors at the time, and, therefore, we are constrained to declare the orders of sale void, and the title obtained under the sale by defendant, Turner, a nullity. But, as all the parties are before us, and as the facts necessary to a settlement of the equities between the parties appear in the bill, answer and proof, we will not stop with simply vacating the sale of the property.

It appears that defendant, Turner, was induced to buy the house and lot by the representations made by the administrators, through the auctioneer. It appears, further, that although Turner paid for the property in Confederate money, the same was available in paying the debts of the estate. We, therefore, hold that he was in no fault in making the purchase, and failed to get any title; and as his money was used by the administrators in relieving the indebtedness of the estate, that he is entitled to be substituted, and to have the value of the payment made by him, estimating the value of the Confederate money at the time of the payment, with interest, refunded to him by the administrators, after charging him with reasonable rent for the property, and allowing credit for permanent improvements and repairs; and if the same is not paid within a reasonable time, that his claim shall be a charge on the property, and the same be sold for the satisfaction thereof. We further hold, that, after satisfying the claim of Turner, the surplus shall be distributed amongst the heirs of N. R. Martin, deceased, excluding from said distribution the two administrators of the estate.

C. M. Wiseman, Ex'r, &c., v. Bean, Wiseman *et als.*

The decree will be reversed, and the cause remanded for further proceedings, as herein indicated. The costs of the court below, and of this court, will be paid by the administrators, out of their personal means.

C. M. WISEMAN, Ex'r, &c., v. BEAN, WISEMAN *et als.*

1. STATUTE OF LIMITATIONS. *Sheriff. Suit on bond of.* The statute of limitations, Code, 2776, bars suits on a Sheriff's bond in ten years from the time the cause of action accrued.
2. SAME. *Same.* Where there is no return of an execution, the statute of three years, Code, 2774, does not apply.
3. PRACTICE. *Executions. Several at the same time, irregular.* The issue of two executions on the same judgment is irregular, but can not affect the liability of Sheriff's acting under the executions. So of an *alias*, without the return of the former execution.
4. JUDGMENT. *Against purchaser at chancery sale.* Form held irregular not void.¹
5. SHERIFF. *Special deputy. What is proof of special deputation.* Where a negro was sold by A at public sale, and the question was, whether A acted as agent for the plaintiff in the execution, or as special deputy Sheriff, and the proof showed that he professed in the transaction to act as deputy Sheriff, signed the receipt D. S.; that the Sheriff spoke, "as he was bound for it," of going to get the money from A; agreed with the defendant to apply part of the money realized by A to another debt; that he agreed with another creditor of the same debtor to pay him a debt out of the same fund; these facts were held sufficient to charge the Sheriff for the act of A as his deputy.

FROM FRANKLIN.

In Chancery at Winchester, before BARCLAY M. TILLMAN, Ch.

¹ See *Rucker v. Moore*, 1 Heis., 726; *Martin v. Turner*, ante, 384.

C. M. Wiseman, Ex'r, &c., v. Bean, Wiseman *et als.*

ISELL, for Ward and sureties.

JOHN FRIZZELL, for Bean and Wiseman.

The judgment mentioned in the opinion, and held to be irregular, but not void, is as follows: "C. M. Wiseman, Ex'r, v. Hall and Wife. This day the Clerk and Master moved for judgments on the following notes: * * * One note on J. H. Wakefield, C. H. Bean and J. M. Wiseman, due twelve months after date, and dated April 2, 1860, for \$1,300. * * * * Wherefore it is ordered by the Court, that said Clerk and Master recover of the parties, respectively, against whom are the notes mentioned, the amounts thereof, respectively, and interest and costs of this proceeding, for which executions may respectively issue."

NICHOLSON, C. J., delivered the opinion of the Court.

On the 2nd of April, 1860, James H. Wakefield bought a slave at a sale made by the Clerk and Master, in the case of Wiseman, Ex'r, v. McElroy's heirs, and executed his note therefor, with C. H. Bean, and J. M. Wiseman as his sureties, for \$1,300. The note not being paid at maturity, the Clerk and Master moved for and obtained judgment on said note, for the balance due thereon, against all the parties. This judgment was informal and irregular, but not void. In December, 1861, on the application of J. M. Wiseman, the Clerk and Master issued two executions on this judgment—one to Coffee county, where Wakefield lived, and the other to Franklin county, where Bean and Wiseman lived. The

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issuance of two executions was irregular, but that is not a material error in this case. On the execution issued to Franklin county, the Sheriff made about \$650, leaving about \$670 uncollected. The execution sent to Coffee county was never returned to the Clerk's office in Winchester. In December, 1865, an *alias* execution was issued to the Sheriff of Franklin, against Bean and Wiseman, for the unpaid balance of the judgment. As the execution sent to Coffee had not been returned or accounted for, the issuance of an *alias* was irregular, but it is a matter of no consequence in the decision of the cause.

Upon the issuance of the *alias*, Bean and Wiseman filed their injunction bill, in which they allege that the Sheriff of Coffee county collected from Wakefield, the principal in the judgment, the full amount due thereon; and, therefore, that they were no longer liable.

To this bill, C. M. Wiseman, executor, and the heirs of McElroy, filed their answer, stating that the balance of the judgment was unpaid; but as they were uncertain who was responsible, whether the makers of the note, Wakefield, Bean and Wiseman, or the Sheriff of Coffee county, B. Ward, and his securities, they obtained leave and filed a bill of inter pleader, making them all parties, and requiring them to inter plead and settle the question of liability.

Bean and Wiseman answer, insisting that the execution sent to Coffee county was levied by Arnold, a deputy of Ward, the Sheriff, and that it was levied on the same slave, as the property of Wakefield, for which the original note was given; and that she was sold for \$901, in

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cash, more than sufficient to satisfy the balance of the execution.

Ward, the Sheriff of Coffee county, and his securities, answer, and deny that Arnold was a deputy of Ward, or that he levied and sold under any authority from him; but that he was acting as the agent of J. M. Wiseman in selling the slave. They, therefore, deny their liability for the acts of Arnold. They also insist on the statute of limitations of three years.

The statute of limitations can not avail Ward, the Sheriff. By the Code, 2776, actions against Sheriffs on their bonds are not barred until ten years after the cause of action accrued. Nor can the statute of three years avail the securities, because, by § 2774, the time when the statute commences to run, is, when the Sheriff has made return of the execution on which the money was collected. As the execution in this case has never been returned, the statute of limitations of three years does not apply.

The real question in the case is purely one of fact; and this, is whether the execution sent to Coffee county was collected by Arnold, as a deputy of Ward, the Sheriff, or as the agent of J. M. Wiseman, one of parties to the execution.

We can derive no assistance, in the settlement of this question, from the testimony of Arnold, as he is shown to be dead. His declarations, however, are proven by both parties; and, by one side, it is shown that he professed to be acting under the authority and directions of Wiseman, and, by the other, that he professed to be a

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regularly appointed deputy of Sheriff Ward. It is proven by Wiseman, that he got the execution from the Clerk and Master, and took it to Tullahoma, to deliver it to Ward; but not finding him, he employed Arnold to take it to him, and directed him to levy it without delay. There is no proof whether Arnold went to see Ward or not, but it is shown that he went in haste to Wakefield's, took possession of the slave, carried her to Tullahoma, and there sold her at public sale, proclaiming that he was selling her as a deputy Sheriff, when she was bid off by Parks at \$901. Arnold received the money, and executed his receipt therefor, signing his name as D. S.

Not long after the sale, Parks and the Sheriff, Ward, were together, when the subject of the purchase of the negro by Parks, was mentioned. Ward remarked that he must go and get that money from Arnold, as he was bound for it. At another time, Ward was at Wakefield's, with a claim on him for about \$40. Wakefield told him he could not pay it, unless he would let him have that amount out of the money for which his negro had sold. Ward agreed to let him have the money, if Wakefield would give him a receipt. Wakefield agreed to it, whereupon paper was got and some writing done, but witness did not read the paper written.

It is also in proof, that Hickerson had a claim of about \$150 on Wakefield, and that Ward agreed also to pay that claim out of money for which the negro was sold. Hickerson proves that Ward afterwards paid him the \$150 for Wakefield, and witness understood from

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Ward that he was paying it out of the money for which the negro was sold.

These several distinct recognitions of his liability for the act of Arnold, are attempted to be rebutted by the contradictory declarations of Arnold, and other circumstances, which are wholly insufficient to relieve Ward of his responsibility for the acts of Arnold.

The decree of the Chancellor will be reversed, and a decree rendered here in favor of complainants in the bill of inter-pleader against Ward and his securities, for the balance due on the execution, with interest, and the costs of this court and the court below.

THOMAS HINES v. D. M. PERKINS, Trustee, &c.

1. **VENDOR'S LIEN.** *Substitution of notes of sub vendee.* If a vendee of lands with reservation of lien on the face of the deed, sell to another and procure him to execute notes to the vendor, which are substituted in lieu, not accepted in satisfaction, of the notes of the first vendee, in the absence of express proof of retention of the lien, the presumption will be that the lien is not waived.
2. **SAME.** *Analogous to Mortgage.* A reservation of a lien in the deed of conveyance stands on the footing of a mortgage.
3. **SAME.** *Not like implied lien. Priorities.* Such lien reserved, stands on a different footing from the implied lien of a vendor, who has conveyed, and will be superior to conveyances made by the second vendee.
4. **PRINCIPAL AND SURETY.** *Presumption. Waiver of lien.* If a vendee sell lands purchased, and he and his vendee join in notes for a remainder of purchase money to the original vendor, the presumption will be that the second vendee joins as principal, not as surety, and the ac-

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ceptance of such a note by the original vendor will not raise a presumption of waiver of the lien reserved in a deed.

Case cited: *Anthony v. Smith*, 9 Hum., 508.¹

FROM LINCOLN.

Appeal from the Chancery Court at Fayetteville, JOHN P. STEELE, Ch., presiding.

J. B. LAMB and JOHN REID for complainant.

Mr. REID cited *Brown v. Vanlier*, 7 Hum., 241, as to conveyance in trust. *Lincoln v. Purcell*, 2 Head, 143, 154; 1 Hil. on Mort., 482, 483, 485; *Tripp v. Vincent*, 3 Barb. Ch., 614; *Anthony v. Smith*, 9 Hum., 508, 513; *Cleveland v. Martin*, 2 Head, 128, 132.

Mr. LAMB cited the same Tennessee cases; also, *Vail v. Foster*, 4 Comst.; *Smedes & Mar. Ch. R.*, 40; *Tieman v. Thurman*, 14 B. Monroe, ———; 6 B. Monroe, 69; *Trent v. Kyle*, 1 Heis., 663; *Burson v. Dosser*, 1 Heis., 754.

JOHN M. BRIGHT, for the defendant, cited: on lien by bond retaining title, *Graham v. McCampbell*, Meigs, 52; *Anthony v. Smith*, 9 Hum., 508. Lien by contract retained in the deed: *Lincoln v. Purcell*, 2 Head, 143; *Thompson v. Pyland*, 3 Head, 537. Contract not now capable of being enforced against original parties: *Union Bank v. Smiser*, 1 Sneed, 501; 2 Gr. Ev., § 523; 11 Johns, 409; 15 Id., 241; 9 Id., 310; *Serg. & Rawle*, 162(?). Waiver of lien: *Marshall v. Christmas*, 3 Hum., 616, 617; *Camp-*

¹See also, *Kinsey v. McDearmon*, 5 Col., 397; and see *Gudger v. Barnes*, Jackson, May 10, 1871.

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bell v. Baldwin, 2 Hum., 248, 258. Parol contract of lien void: Code, 1758-5.

NICHOLSON, C. J., delivered the opinion of the Court.

In 1853, Thomas Hines sold to Steele & Edmiston, several tracts of land in Lincoln County, for the price of \$19,000, the purchasers paying in cash, \$5,000, and executing their notes, on nine years' time, for the residue of the purchase money. Hines executed to them a deed for the land; but, on the face of it retained a lien for the payment of the notes so executed, for the residue of the purchase money. The deed was regularly probated and registered on the 31st of March, 1853.

The bill is filed to enforce the lien so retained. Complainant alleges, that soon after said sale and conveyance to Steele & Edmiston, they sold the lands to Henry A. Kelso, and then he sold to R. A. McDonald. After which sales and conveyances, complainant alleges, Steele & Edmiston applied to complainant and requested him to take the notes of Kelso & McDonald, who were then partners, to be made payable to complainant in lieu of the notes of said Steele & Edmiston; which he consented to do, but still to retain his lien upon the land, as specified in his deed. Whereupon, he alleges, said Kelso & McDonald executed to him their joint and several notes for the same amounts, and payable on the same time. That he then surrendered the notes of Steele & Edmiston, and received in lieu thereof, the notes of Kelso & McDonald, but by no act, word or deed, meaning to release his lien, but retaining and relying on the same as contained in his deed.

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He also alleges, that Kelso & McDonald have paid the first six notes, leaving the last three, for the satisfaction of which his bill is filed.

He further alleges, that McDonald, by deed dated in 1865, conveyed the said lands in trust, to defendant, Perkins, to secure the payment of certain debts named, but making no provision for the payment of said purchase money due to complainant.

Defendants, McDonald and Perkins, answer jointly. They admit the sale of the land by complainant to Steele & Edmiston, but don't know whether the deed was regularly registered, nor whether an express lien was retained upon its face. They are willing to admit that Steele & Edmiston sold the lands to Kelso, and that Kelso sold to McDonald. Defendant McDonald does not know whether Steele & Edmiston requested complainant to take the notes of Kelso & McDonald, in lieu of their own. He admits that he and Kelso were partners in other transactions, but denies that he was a partner of Kelso in the purchase of the lands. He admits that he and Kelso executed their joint and several notes to complainant, to be used about the payment of the land, and supposes they were in lieu of the notes of Steele & Edmiston. He signed said notes only as the security of Kelso. Defendant Perkins, says he knows nothing in respect to the exchange of notes. Defendants do not remember, or know, or admit, that at the time of the exchange of notes, there was a contract or understanding that the lien should be reserved and applied to the substituted notes. They admit the execution of the trust deed, and insist that the beneficiaries have a better title to the land than complainant.

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The defendants answered under oath.

As preliminary to an examination of the question of law arising in the cause, we deem it useful to state succinctly the prominent facts to be deduced from the bill and answer.

It is clear, that when Kelso & McDonald executed their notes to Hines, to be substituted in lieu of the notes of Steele & Edmiston, they did so with a knowledge that the notes of Steele & Edmiston had been given as the purchase price of the lands, which Kelso had then purchased from Steele & Edmiston, and had sold to McDonald. They knew that their notes, payable to complainant, were received by him in lieu of the notes given for the purchase money. They knew that all of the purchase money for the land was unpaid, except the cash payment of \$5,000. They executed their notes, with notice, that the deed from complainant to Steele & Edmiston contained a reservation of a lien on the lands for the satisfaction of the notes, for which the notes of Kelso & McDonald were substituted. They do not show when Kelso purchased from Steele & Edmiston, what he paid, or how, or what kind of conveyance he took from them. Nor do they show when McDonald purchased from Kelso, what he paid, or how, or what kind of conveyance he took from him. In response to the allegation that Kelso & McDonald were partners, and that they executed to complainant their joint and several notes, they admit they were partners in some transactions, but not in the purchase of the land; and they admit they executed their joint and several notes, but they say that McDonald only executed the notes as security for Kelso.

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The contest in this cause is between the vendor's specific lien, created by contract, and regularly registered, and the creditors, whose claims are secured by conveyance of the lands to a trustee. In such a contest the prior specific lien will prevail over the subsequent lien created by the deed of trust, whether the creditors have accepted the benefits of the deed or not. *Brown v. Vaulier*, 7 Hum., 241.

It is therefore clear, that when Kelso bought the lands of Steele & Edmiston, and when McDonald bought of Kelso, they took them subject to the express lien of complainant. This was the case, no matter what was the character of the conveyances from Steele & Edmiston to Kelso, and from Kelso to McDonald. If, therefore, complainant had continued to hold the notes of Steele & Edmiston, no question could be raised as to the superiority of his lien over the claim of McDonald or his creditors under the trust deed.

But the controversy arises upon the substitution, by the agreement of all the parties except Perkins, the trustee, of the notes of Kelso & McDonald for those of Steele & Edmiston. This substitution took place after Kelso had bought the land of Steele & Edmiston, and after McDonald had bought of Kelso, both of which transactions were in a short time after the sale by complainant to Steele & Edmiston. It does not appear what was the specific contract between Steele & Edmiston with Kelso, or of Kelso with McDonald, but it may be reasonably inferred that Kelso refunded to Steele & Edmiston the cash payment of \$5,000 he had made to complainant, and executed his notes to them for the amount owing by them to complainant. And in like manner that McDonald refunded

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to Kelso the \$5,000 paid to Steele & Edmiston, and executed his notes to Kelso for the balance of the purchase money. When the exchange and substitution of notes took place, complainant, instead of taking the notes of McDonald, payable to Kelso, took the joint and several notes of Kelso & McDonald, payable to himself.

It is not debatable, that when the vendor has only the implied lien or equity, it will be considered as waived whenever he takes any distinct or independent security, whether by mortgage of other lands, or pledge of goods, or personal responsibility of a third person; unless there is satisfactory evidence that he intended to retain the implied lien: *Campbell v. Baldwin*, 2 Hum., 248; *Marshall v. Christmas*, 3 Hum., 616.

Much of the apparent confusion in the authorities as to the application of the principles connected with the vendor's lien, has grown out of the failure to observe the distinction which exists between the implied lien for purchase money, where the vendor has conveyed the title, legal and equitable, to the vendee; and the express lien, either reserved by retaining the legal title or by contract on the face of the deed.

In the case of *Anthony v. Smith*, 9 Hum., 508, this distinction is pointed out by Judge McKinney: He says, "in the former case the vendor has parted with both the legal and equitable estate. In the case where the legal title is retained, the law will presume it to have been retained as an absolute security for the purchase money. In this case, the vendor, retaining the legal title, is placed upon the footing of a mortgagee, who has taken a security for the purchase money." In such case, Judge McKinney

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holds, "that the operation of the waiver of the lien, by the substitution of a third person's note, can not arise. The security of the vendor, in such case, can not be defeated by any thing short of what would be regarded as sufficient to extinguish or defeat the security of the mortgagee:" 9 Hum., 508.

In this opinion, Judge McKinney confined his attention to the distinction between the implied vendor's lien, and the lien resulting from a retention of the legal title in himself. The facts of the case before him not calling for any reference to the express lien, by contract retained on the face of the vendor's deed, none was made. But there is the same marked distinction between the vendor's implied lien for the purchase money, in cases where the legal and equitable title have both been conveyed to the vendee, and the express lien by contract retained by the vendor in the face of his deed to the vendee. In the latter class of cases, the vendee receives the legal title, subject to a specific and express charge for the purchase money, retained in the deed for the vendor. In these cases the vendee becomes a trustee for the vendor, and holds the legal title in trust for the vendor. His relation to the vendor is substantially that of mortgagor to mortgagee. In these cases, as in those where the vendor retains the legal title, the security of the vendor can not be defeated by anything short of what would be regarded as sufficient to defeat or extinguish the security of a mortgagee.

Our conclusion, therefore, in the present case, is, that the only question for determination is, whether the substitution of the notes of McDonald & Kelso, for the notes of Steele & Edmiston, originally given for the balance of

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the purchase money, can be regarded, in law, as a payment of the debt to complainant. That it can not, is clear. Complainant charges that he received the notes of Kelso & McDonald, in lieu of those of Steele & Edmiston, with the distinct understanding and agreement, that his lien for their payment was to continue. McDonald, at the time the notes were given, had bought the lands from Kelso. In his answer to the allegation that it was agreed the lien was to continue, he evades the charge, and says he does not remember how that was, and therefore does not admit, nor does he deny it. He knew when he gave the notes that he could not get an absolute title to the lands, until complainant's express lien was satisfied. He knew that the notes of Steele & Edmiston constituted the balance of purchase money which had to be paid before his title could be perfected, and he substituted the notes of Kelso and himself for those of Steele & Edmiston, for the purpose of assuming the payment of the balance of the purchase money. All the facts and circumstances repel the idea that McDonald was the mere security of Kelso. Why should he become the surety of Kelso, when he had bought the land from him, and was bound to pay the purchase money before his title could be perfected? We are satisfied that complainant received the notes of Kelso & McDonald, not as payment of the debt due him by Steele & Edmiston, but by way of substitution, and without any purpose of waiving or relinquishing his lien.

Nor does Perkins, the trustee, stand in any other or better position than McDonald. His grantor, McDonald, held the lands in trust for the payment of the balance of the

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purchase money due to complainant. As the charge on the land was fixed by a registered contract, McDonald could convey to Perkins no more title than he had himself. Perkins, therefore, holds the legal title of the lands, subject to the prior and superior lien of complainant for the satisfaction of the balance of the purchase money.

Let the decree of the Chancellor be affirmed, with costs.

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1. REGISTRATION. *Form of probate.* A certificate of probate, which does not show that the bargainor acknowledged the execution of the deed in the presence of the witness, is cured by the Code, 2080.
2. DEED OF TRUST. *Reservation or exception. Property exempted.* An exception, of such articles as are exempt from execution, out of the operation of a deed, does not affect the validity of the deed, further than to prevent the passing of the title to the property of like character with that reserved until the separation of the goods reserved from those conveyed.
3. SUGG v. TILLMAN distinguished from this case. Here the property exempt from execution is excepted out of the conveyance, and did not pass. There it was conveyed by clear words, and then reserved to the bargainor. This may not be material, if the property is described so as to distinguish it. In both cases, what is sold is not separated from what is reserved; and so the property which passed, could not be ascertained without a separation from that which did not. This fact could only affect property conveyed of like kind with that reserved. As to such the title would pass on the subsequent separation of the property by the act of the parties, and in this case the separation took place before the attachment was levied.
4. FRAUDULENT CONVEYANCE. *Possession by vendor.* The retention, by the maker of a trust deed, of the possession of a dwelling house conveyed, for a time before forec'osure, is not inconsistent with the terms of a deed of trust to secure the payment of debts.

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5. DEED OF TRUST. *Presumption of acceptance.* On the conveyance of property in trust for creditors, the presumption of acceptance arises, and the property vests in the trustee, irrevocable by the grantor, to await the election of the beneficiaries.
6. SAME. *Repudiation of deed.* A distinct and unequivocal act of repudiation of a deed by a beneficiary in it, will operate as an estoppel to claim a benefit under it.

Cases cited: *Sugg v. Tillman*, 2 Swan, 208; *Roane v. Bank of Nashville*, 1 Head, 531; *Bennett v. Union Bank*, 5 Hum., 612; *Mayer v. Pulliam*, 2 Head, 346; *Austin v. Johnson*, 7 Hum., 191; *Sommerville v. Horton*, 4 Yer., 541, 3 Yer., 257; 3 Hum., 446; 1 Head, 186; *Furman v. Fisher*, 4 Cold., 626, 630; *Mills v. Haines*, 3 Head, 335; *Green v. Demoss*, 10 Hum., 371.

FROM LINCOLN.

Appeal from the decree of the Chancery Court at Fayetteville, JOHN P. STEELE, Ch., presiding.

JOHN C. BROWN, for complainants, insisted that an assignment reserving benefits to the maker is void: 3 Yer., 503; 4 Yer., 541; Meigs, 583; *Trabue v. Willis*, Ib., 584; *Peacock v. Tompkins*, Ib., 328; *Sugg v. Tillman*, 2 Swan, 208. Exception in deed: 2 Washb. Real Prop., 686, § 57; 1 Smith's Lead. Cas., 480, (Teague's case); 1 Sanford, Ch. 83, 251, 348; U. S. Eq. Dig., 555, 559; *Beaumont v. Dailey*, MS., from Clarksville, decided at Nashville, December, 1867, affirming *Sugg v. Tillman*, and holding a deed void by reason of this clause, "Reserving only for myself a sufficiency for the supply of my family;" *March v. Trigg*, MS., at the same term, where the deed was held void by reason of this clause, "I convey all my household and kitchen furniture and farming utensils, over and above what the law exempts from execution at law." On articles consumable in the use: Meigs'

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584; 5 Hum., 496. Possession as a badge of fraud: 4 Yer., 550; 3 Yer., 502; Meigs, 584; 5 Cow., 566; 17 Ves., 196; citing Trayner's case, 3 Coke, 80; 1 Smith's Lead. Cas., 71, 81; 1 Tenn., 91; 3 Yer., 475; 4 Yer., 164; 7 Yer., 440; 8 Hum., 717; 3 Yer., 502; 5 Hum., 496; 4 Yer., 541; 8 Yer., 419; Meigs, 281; 3 Head, 578. Reservations in a deed for the benefit of the grantor: *Doyle v. Smith*, 1 Cold., 20; citing 9 Sm. & Mar., 433; 14 Johns., 458; 4 Yer., 548. Fraud in part avoids the whole deed: 4 Yer., 541; *Hyslop v. Clark*, 14 Johns. Clause in deed for exclusion of creditors: 7 Paige, 570; *Wilds v. Rawlings*, 1 Head, 36; 11 Hum., 283; *Mayer v. Pulliam*, 2 Head, 347. Acceptance of deed: *Mills v. Haines*, 3 Head, 336. Failure to prove considerations alleged in deed: 3 Head, 578; 2 Pet., 39. Postponing creditors unreasonably, 4 Yer., 548; 3 Pars. on Contr., 485, n. 6. Form of probate: Code, 2058; 3 Head, 486; 3 Cold., 505.

JOHN M. BRIGHT, for defendants, cited, on fraud in law: Code, 1759; Ang. on Asgt's, 8, 9; *Hefner v. Metcalf*, 1 Head, 577; Bur. on Asg'ts, 404, 407. Preferring creditors: Ang. on Asg'ts, 1; Hill. on Trust., 1; 1 Head, 557. Postponement of creditors: 1 Hare & Wal. L. C., 91; *Roane v. Bank of Nashville*, 1 Head, 531; *Bennett v. Union Bank*, 5 Hum., 616; 1 Head, 577; Bur. on Asgt's, 404, 407. Clause limiting time for presenting claim: Ang. on Asg'ts, 71, 72, 73; Hill. on Trust., 476, top and n.; 6 Paige, 415; 2 Paige, 490; 2 Head, 346. Reserved property: *Darwin v. Handley*, 3 Yer., 505; *Som-*

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merville v. Horton, 4 Yer., 544; *Young v. Pate & Kernigog*, 4 Yer., 164; *Simpson v. Mitchell*, 8 Yer., 417; *Trabue v. Willis*, Meigs, 583; *Peacock v. Tompkins*, Meigs, 328, 331; 1 Hare & Wal. L. C., 92, 93; *Sugg v. Tillman*, 2 Swan, 208; *Goodrich v. Downs*, 6 Hill, (N. Y.) 438; Ang. on Asg'ts, 137; Bur. on Asg'ts, 244; 4 Kent, 468. Property may be separated before adverse right attaches: Ang. on Asg'ts., 67; Bur. on Asg'ts, 324; *State v. Haggard*, 1 Hum., 392. Description of property conveyed: *Charlton v. Lay*, 5 Hum., 497; *Barker v. Wheelip*, 5 Hum., 329. Consumable articles: 5 Hum., 498; 5 Sneed, 629. Retention of property by vendor: *Bumpas v. Dotson*, 7 Hum., 317; *Mitchell v. Beal*, 8 Yer., 142; *Manning v. Killough*, 7 Yer., 444; 4 Yer., 541. Reserving surplus: Code, 2013; Ang. Asg'ts, 128; Bur. on Asg'ts, 320. Fraud in law: 5 Hum., 616; 1 Hare & Wal., 96; *Richards v. Ewing*, 11 Hum., 327; *Neuffer v. Pardue*, 3 Sneed, 191; *Lasell v. Tucker*, 5 Sneed, 33; *McGavock v. Deery*, 1 Cold., 266; *Doyle v. Smith*, Ib., 19. If the deed was void as to the excepted property, it was good as to the rest. Assent of creditors. This question is not in issue: 1 Ten., 509; Cooke, 173; Ang. on Asg'ts, 188; *Brashier v. West*, 7 Pet., 608; Heis. Dig., 520, and cases cited. Formal assent not required. He attacked *Mills v. Haines*, 3 Head, 335; *Galt v. Dibbrell*, 10 Yer., 147, and *Green v. Demoss*; citing *Acton v. Woodgate*, 8 Cond. Eng., Ch., Rep., 99. Distinguished between deeds made to a trustee, and those made direct to creditors, &c., citing *McKinnon v. Stewart*, 1 Eng. L. & E., 158 164; Ang. on Asg'ts, 169, 170, 173, 175, 186 and n.; *Halcey v. Whitney*, 4 Mason, 206; 4 *Ib.*, 183; *Widgery v. Haskell*, 4 Mason,

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144; 4 Johns., 522, 529; 11 Wend., 248; 9 Serg. & Rawle, 244; 7 Wheat., —; 11 Wheat, 78; 1 Binney, 502; 3 Mau. & Selw., 371; 2 Gall., 557; 2 John., 283; 5 New H., 71; 3 Day, 348; 2 Conn., 579; 3 Hum., 446; 3 Yer., 257; 4 Cold., 630; 1 Head, 186. Acceptance by trustee: Bur. on Asg'ts, 347, 351 and n. Registration law makes deed take effect from registration, and so dispenses with acceptance: Code, 2072, 2073; Tucker's Com., (269) 261; *Burgin v. Burgin*, 1 Ire. L., 453; Hutchison's Miss. Code, 606, § 5; *Henderson v. Downing*, 24 Miss. (2 Cushm.) 114. Reserving power of revocation until acceptance would avoid deed: 2 Johns. Ch., 576. Assignment of chose: *Keyes v. Bush*, 2 Paige, 311; Bur. on Asg'ts, 349. Attacking creditors excluded: Hill. on Trust., 472, top; *Furman v. Fisher*, 4 Cold., 626; *Coleman v. Pinkard*, 2 Hum., 185; *Thurman v. Shelton*, 10 Yer., 383; 3 Head, 335; 6 Cold., 624; 2 Eng. L. R., 15; 20 Eng. L. R., —; Hare & Wal. L. C., 96, and cases cited: Hill. on Trust., 470, 471 and n.

NICHOLSON, C. J., delivered the opinion of the Court.

On the 15th of July, 1865, R. A. McDonald executed to D. M. Perkins, a conveyance in trust, to various tracts of land, containing over two thousand acres, specifically described by metes and bounds, and various articles of personal property, specifically enumerated, together with notes, judgments and choses in action, which are set out in detail. After enumerating a number of articles of personal property, consisting of household furniture, two cotton gins, one gin band, three four-horse wagons, there follows this language, "all farming utensils, except such

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as are exempt from execution;" and then he proceeds, "one corn mill, one set of blacksmith tools, one cow, three yearlings, all the hogs and sheep, except the number exempt from execution," etc. He conveys, also, all that portion of the crop due him as rent for the year 1865. The deed then contains the specific trusts. He first specifies three notes, held by Benjamin Fanning, for three thousand dollars each, on which Henry Kelso and James Fulton were securities; the said notes having been given for the Hines tract of land. He next specifies a bill of exchange for \$15,000, on which D. M. Perkins was his indorser. He then adds, that he is indebted to many other persons, by notes, executed in his name or the firm name of McDonald & Kelso, of which he is desirous of securing the payment. For that purpose, he provides that the trustee will proceed, as speedily as possible, to collect the notes, and apply the proceeds in payment of the bill of exchange of \$15,000. He is directed to collect the rents, and then he proceeds: "Now, if I should pay said debts, hereinbefore provided for, by the 1st of September, 1866, then this deed to be void. But if I should fail to pay said debts, or any part thereof, then the said Perkins shall proceed to sell said lands and personal property, or a sufficiency thereof, for cash, at such time and place as he may select, on some portion of said described premises, and sell the same to the highest bidder, first having advertised the time, place and terms of sale, as required by law, and will apply the proceeds in payment, first, of said bill of exchange indorsed by said Perkins, say \$15,000. Secondly, he will apply the proceeds, arising from the sale of the Hines tract of land,

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to the payment of said three notes, in favor of said Benjamin Fanning, for \$3,000 each, etc. Thirdly, the said Perkins' trustee will pay all the other claims, whether they be in my own name, or the firm name of McDonald & Kelso, alike; and for that purpose he will pay the same *pro rata*; provided, he is only to pay such of said claims provided in the third place, as are presented by the 1st day of January, 1867," etc. The said Perkins is authorized and empowered to divide said land into such lots and parcels as he shall deem best for the interest of the parties. Lastly, "the said Perkins will pay over to me the balance of said funds, if any should be left."

The deed was proven by the two subscribing witnesses, before the Clerk of the County Court of Lincoln County, on the 15th of July, 1865, the day of its execution. The certificate of the County Court Clerk pursues the form of the probate set out in the Code, except that he does not certify that the witnesses deposed and said that the bargainor acknowledged the deed "in their presence;" these latter words being omitted. The deed was properly registered on the 17th of July, 1865.

About the 16th of August, 1865, R. Farquharson filed his bill of attachment against McDonald and Perkins, attacking the deed as fraudulent on its face; attaching the lands conveyed, and praying that the deed be set aside for fraud, and the land sold to satisfy his claim. In a short time, various other creditors of McDonald, to the number of nearly thirty, filed similar bills of attachment; all of which were consolidated and heard together.

McDonald and Perkins answer the consolidated bills

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jointly, and deny all the allegations which impute to them either fraud in law or in fact.

Afterward, Perkins filed his cross bill against the attaching creditors, in which he requires them to establish the justness of their claims, and insists that if the deed should be declared valid, they have forfeited any right to claim benefits under it, by attacking its validity.

Before proceeding to examine the several grounds on which the deed is assailed as fraudulent, it may not be improper to notice an objection to the authentication of the deed, which is not raised in the pleadings, but which has been somewhat discussed in the argument. The objection is, that the words "in their presence," contained in the form for the County Court Clerk's certificate, in section 2058 of the Code, are not contained in the certificate to the deed. If this point were properly before us, under the pleadings, we should hold that the omission was fully cured by the provision in section 2080 of the Code.

The objection to the deed, mainly pressed and relied on as rendering it void, is based upon the clause conveying the personal property, in which, after enumerating "all farming utensils," the language follows: "except such as are exempt from execution;" and after specifying "all the hogs and sheep," the words "except the number exempt from execution," are used.

It is insisted that these exceptions are fatal to the deed, and render it void in law.

It is correctly stated in the argument, that a conveyance in trust, reserving or retaining to the bargainor a benefit on its face to any part of the trust property, is void; and an

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assignment to chosen creditors, securing any benefit or advantage in the use of the property assigned to the assignor, is void in law, as to all other creditors.

But does this deed reserve or secure any benefit or advantage to McDonald, in the use of any part of the property conveyed by him to Perkins, the trustee? His language is: "I also convey to said Perkins, the following personal property, viz: a parcel of building lumber, &c., &c.; all farming utensils, except such as are exempt from execution, &c., &c.; all the hogs and sheep, except the number exempt from execution, &c." What is the natural import of this language? Does it mean that "all the farming utensils," and "all the hogs and sheep," are first conveyed to the trustee, and then they are reserved, or retained, or excepted, for the use and benefit of the bargainor? Or does it mean that "all the farming utensils" and "all the hogs and sheep" left, after taking out what the law exempts from execution, are conveyed to the trustee? The bargainor does not convey all of this property to the trustee; he conveys all *except* that portion which the law exempts from execution. If he had a dozen plows, and one hundred hogs, and fifty sheep, he meant to convey all of his plows except one—that is, eleven; and all of his hogs and sheep except ten of the former and five of the latter—that is, ninety hogs and forty-five sheep; the one plow, and ten hogs, and five sheep, were intended to be reserved or excepted from the conveyance.

As to the excepted articles, the title never was vested in the trustee, but remained in McDonald, under the protection of the exemption laws. Upon this construction

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of the language of the conveyance, there was no reservation of any benefit to McDonald to be derived from any portion of the property conveyed to the trustee.

In the next place, it is to be observed that, although the time for the sale of the property, real and personal, conveyed, is postponed by the deed until the 1st of September, 1866, there is nothing in any of its provisions which expressly reserves to McDonald the use of any of the property. The legal title passed to the trustee, and his right of possession attached as soon as the deed was registered. The deed itself secured to McDonald no right to continue in the use and occupation of the excepted property. He continued in the possession of these excepted articles, under the "poor" laws.

Again: amongst the articles of personal property conveyed to the trustee, as enumerated and specified on the face of the deed, there is none that was consumable in the use thereof; so that, looking at the face of the deed, we find nothing which reserves or retains any benefit or advantage to the bargainor. He divests himself of his title to all the land and personal property described and enumerated, and retains the title in himself to so much of the farming implements, hogs and sheep, as the law sets apart for poor persons. In the property conveyed, he ceased to have any right of use or control, so soon as the deed was registered and the trust was accepted.

But it is insisted with much earnestness and confidence, that the present case is controlled by the case of *Sugg v. Tillman*, 2 Swan, 208. It requires but a slight reference to the language of the deed, as copied by

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Judge Caruthers into his opinion, to show a marked distinction between the two cases. Judge Caruthers states the case as follows:

“After conveying all his land, negroes, stock, corn, fodder, bacon, pork, and farming, household and kitchen utensils, and all his furniture, a reservation upon it is inserted in these words: ‘Reserving to myself, however, out of the aforesaid stock, farming utensils, provender, provisions, household and kitchen furniture, (*as all of my property of that description is intended to be embraced by this conveyance,*) so much as I am by law allowed to retain free from execution.’”

The difference between the two deeds is this: In McDonald’s deed, he excepts from his conveyance so many of the farming utensils and of the hogs and sheep as are exempted by law from execution. In Tillman’s deed, he says, expressly, that he intends all of his stock, farming utensils, provender, provisions, household and kitchen furniture, to be embraced by his conveyance; but notwithstanding he has conveyed all, yet he undertakes to reserve to himself so much thereof as the law allows him to retain free from execution. Judge Caruthers fully comprehended the meaning of Tillman’s deed; for he says: “Now, is there not an express reservation of a portion of the property *conveyed*, for the use of the debtor, in the clause above extracted?” Unquestionably, there was such reservation of the property expressly embraced in his deed; and as a portion of the property so reserved was consumable in its use, the case came literally within the authorities which declare such deeds fraudulent and void.

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But it is not clear that the insertion in a trust deed of consumable property, which was not subject to execution, with a distinct reservation of the bargainor's right to use it, would, *per se*, render the deed fraudulent. If the property reserved, whether consumable or not, was so described as to be distinguishable from the property of like character not exempt, no inference of fraud would arise.

But if the object of the bargainor was to use the exemption laws as a mask for protecting the property subject to execution, by so mingling and confounding the exempted and the unexempted articles as to hinder and embarrass creditors, then the deed would be fraudulent. That was the view taken of the deed of Tillman by Judge Caruthers, and in that view the decision may be maintained. In this view, the deed would be fraudulent, whether the exempted property reserved was consumable in its use, or not. The deed of McDonald is subject to no such objection, for the reason that the exempted property was not included therein, but was expressly excepted and excluded from its provisions; and there was no reservation of the property conveyed, either consumable or not consumable, for his own benefit.

The decision in *Sugg v. Tillman*, is rested on another ground, which comes legitimately under consideration in the case before us. This objection to Tillman's deed is stated by Judge Caruthers, as follows:

"But, upon another ground, it (the reservation) would avoid the deed. It is in the nature of a sale of all the property of the vendor of the same nature, to these trustees, for the payment of debts, except so much of

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the same as he is allowed by law to hold exempt from execution. Now, what is sold is not separated from that which is reserved from the sale. * * The vendees or trustees cannot bring trover for the quantity conveyed to them, because it is not separated from the part retained. They have no title in any particular thing or quantity. * * The property, therefore, under this principle, not passing at all, remains subject to other execution creditors."

It is to be observed that this objection to the deed is not made to rest upon the ground that the conveyance is void for fraud, but upon the ground that no title passed to the trustees. It is readily conceded that, as to those articles of property conveyed, which were of the same character with the articles reserved, no title would pass until the party having a right to make the selection had done so. And until the selection was made, the property of that character would be subject to execution by other creditors: *Benj. on Sales*, 242; *Gillet v. Hill*, 5 Taunt., 617. But if there was no fraud in making the reservation of property exempt from execution, without separating it from property of the same character conveyed, the deed would be valid, and pass the title to all other property not of the same character with that exempt from execution. With this qualification, we recognize the principle of law declared by Judge Caruthers.

In the deed of McDonald, all the property, real, personal and mixed, conveyed to the trustee, is specified and described, except the farming utensils, the hogs and sheep; everything else is conveyed specifically and absolutely

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and no question can be made as to the title having passed so soon as the deed was registered. As to the farming utensils, the hogs and the sheep, the title did not pass to the trustee, because the exempted and unexempted portions thereof were not set apart and separated; but as the proof shows that this separation was made soon after the deed was made, and before any execution or attachment was levied thereon, we hold that the deed was in no wise affected by the clauses excepting the farming utensils, hogs and sheep, not subject to execution, from the operation of the deed. Benjamin on Sales, 248.

The objection to the deed, because the time for the sale of the property was postponed from July 15th, 1865, until September, 1866, is fully met by the cases of *Roane v. Bank of Nashville*, 1 Head, 531, and *Bennett v. Union Bank*, 5 Hum., 612.

The objection, that only those creditors who should present their claims by the 1st of January, 1867, should share in the benefits of the deed, is met by the case of *Mayer v. Pulliam*, 2 Head, 346.

The objection that the deed closes with a provision that any balance, after paying the debts, shall be paid over to McDonald, is met by the case of *Austin v. Johnson*, 7 Hum., 191.

Our conclusion is, that there is nothing on the face of the deed from which we are authorized to hold that it was made to hinder, delay or defraud creditors.

The only other ground on which the deed is attacked, is, that McDonald remained in possession of the property after the deed was executed. This allegation is made in some of the attachment bills filed a few weeks after the

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date of the deed. Defendants, McDonald and Perkins, deny the allegation, except as to the residence of McDonald in Fayetteville. The proof shows that some few weeks after the date of the deed the trustee took charge of all of the property except the residence, which McDonald continued to occupy. McDonald and Perkins concur in the statement in their answer, that they considered McDonald as having a right to retain the property until default in payment of the debts. The deed contains no express direction as to the time when the trustee should take possession of the residence, but we infer from the directions as to the choses in action, and as to the rents of the lands, that the continuance of McDonald in the residence was not inconsistent with the deed. The attaching creditors, who attached the property soon after the deed was made, took no steps to disturb the possession of McDonald by having a receiver appointed to rent it out; nor do we see that the beneficiaries under the deed objected to the construction placed upon the deed by the trustee. Our conclusion is, that the retention of the residence by McDonald is satisfactorily explained by the circumstances, and that it was not fraudulent. *Sommerville vs. Horton*, 4 Yer., 541.

Holding, as we do, that the deed executed by McDonald, on the 15th of July, 1865, was valid and unaffected by fraud, either in law or in fact, it follows that the legal title to the property conveyed passed, upon the registration of the deed to Perkins for himself and for such other creditors of McDonald as might elect within the time prescribed to accept its benefits. Upon the registration of the deed, McDonald was divested of the legal

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title, and the law presumes that the benefits designed for the beneficiaries will be accepted by them, and the title vests in the trustee, irrevocable by the grantor, to await the election of the beneficiaries. 3 Yer., 257; 3 Hum., 446; 1 Head, 186; Burrill on Assign., 351; 4 Cold., 630.

But while it is true that all the beneficiaries under a trust deed are presumed to accept its benefits, it is equally true that they may repudiate and reject the deed. 10 Hum., 371; 3 Head, 335; 4 Cold., 626. And any distinct and unequivocal act of renunciation and repudiation of the benefits of the deed, by any of the creditors intended to be benefited, will operate as an estoppel against further claims under the deed. Hill on Trustees, 472; *Furman v. Fisher*, 4 Cold., 626.

The decrees made by the Chancellor are affirmed, except so much thereof as determines that the special commissioner or Clerk and Master shall take proof, and report whether what is known as Confederate money constitutes in whole or in part the consideration, directly or indirectly, of any of the claims against said McDonald, and declaring all such claims to be null and void. In this respect, the decree of the Chancellor is reversed; in all other respects, the same will be affirmed. The cause is remanded for further proceedings in carrying out said decrees, as modified, in pursuance of this opinion. The costs will be paid by the appellants.

Shaw, Barbour & Co., v. A. D. Armstrong.

SHAW, BARBOUR & Co., v. A. D. ARMSTRONG.

1. COSTS. *Sheriff's cost on compromise of Attachment Suit.* A Sheriff who has levied an attachment becomes, on payment or settlement of the case, entitled to commissions, at the rate allowed upon executions, to be computed upon so much as is realized by the plaintiff from the defendant by payment or satisfactory settlement.¹
2. SAME. *Same.* Where, after levy, the defendant became bankrupt, and the plaintiff agreed to take \$500 and release the attachment, and prove his debt in bankruptcy, the Court allowed commissions on the \$500, but refused it on what might be subsequently realized in bankruptcy.

Statute construed: 1867, c. 39, s. 2.

FROM BEDFORD.

Appeal from the Chancery Court at Shelbyville.

T. S. STEELE, BROWN & MARTIN, for the Sheriff.

FREEMAN, J., delivered the opinion of the Court.

The question presented in this case is, what commissions the Sheriff is entitled to, who had levied an attachment on a stock of goods of defendant, the invoice value of which was estimated to be \$4,445.43.

The attachment was issued in pursuance of the prayer of a bill filed, to recover an indebtedness of defendant to complainant, amounting to about \$2,600.

A Receiver was appointed by the Chancellor, and by consent the goods levied on were ordered to be sold, and proceeds held in Court, subject to the final action of the Court in the case.

¹See *Porter v. Thompson, Jackson*, May 6, 1871.

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The defendant, Armstrong, it seems, became a bankrupt, and by consent of parties, the bill of complaint was dismissed, and the attachment discharged, all costs that had accrued to be paid out of the funds arising from the sale of the property attached. It was agreed that complainants were to receive \$500 out of the funds in the hands of the Receiver, and the balance of the funds were to go to the assignee in bankruptcy; complainants to come in *pro rata* as other creditors, under said proceedings in bankruptcy.

The Chancellor decreed that the Sheriff was entitled to commissions on the \$500 received, and on any additional sum which the complainant may receive by virtue of the above compromise decree, and not on the whole amount of complainant's debt, as was insisted by the Sheriff, from which decree there was an appeal to this Court.

The question depends on the proper construction of the second section of Act of March, 1867, chap. 39, p. 60, Pamphlet Acts, which is, "That in all cases of attachment suits, where the Sheriff of any County in this State may levy an attachment, and the amount for which the attachment is levied shall be paid or satisfactorily settled, the Sheriff levying the same shall be entitled to the same commissions as in cases of executions."

As far as we have been able to see, there was no provision made in terms in the Code for any commissions for collecting officers, except on executions. This statute plainly, was intended to give the Sheriff, who had levied an attachment on property to secure a debt or sum of money due the plaintiff in the attachment, commissions on

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the amount of such debt, where the same was paid or satisfactorily settled after such levy. Taking the language literally, it would only give the commissions where the whole debt was paid or settled; but a fair construction of it entitles the officer to his commissions on whatever amount may be realized by payment from the defendant in the attachment after the levy.

The statute, however, certainly did not intend that the officer should have his commissions, whether the plaintiff realized his whole debt or not, on the full amount of such debt.

If the debt "was satisfactorily settled," can only fairly mean an adjustment, and satisfaction of it without paying the money; as where, by compromise, it shall be paid in the property levied upon by plaintiff's attachment, or where the debt should be satisfied in some other way than by payment of actual cash. To the extent of such satisfaction, the Sheriff will be entitled under this statute to his commissions, but no further.

The Chancellor's decree rests on this principle, and gives the commissions on the \$500, and to this extent he was correct.

As to the commissions on the sum to be received in a *pro rata* distribution of the bankrupt's estate, we think he erred. That is to be had under a different proceeding, and is not adjudged to complainant in the compromise decree. It fairly means, that the complainant will simply look to that source, and seek to obtain what he can, as a creditor of the estate, and will not further prosecute his attachment suit, the same being dismissed on payment of the \$500. It is not "satisfactorily settled" within the

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meaning of the statute, by this arrangement; but the same may be settled in full, or in part, dependent on the amount the bankrupt proceedings may pay the creditors of the bankrupt in the final distribution of his assets.

The decree will be affirmed, so far as it allows commission on the \$500, and reversed as to balance.

The Sheriff and his sureties for appeal will pay the costs of this Court.

SAMUEL V. BLANTON *et als.* v. JOHN F. HALL, *et als.*

CHANCERY PLEADING AND PRACTICE. *Parties. Officers, principals and agents. Decree without process.* A bill filed to enjoin proceedings on a judgment and execution, must make the plaintiff in the execution a party. If it be filed against the officer having the execution, and an agent of the plaintiff, jointly with the plaintiff, but no process issue against the plaintiff, a judgment *pro confesso* and a decree against him, will be void, and will be reversed as to all, and the cause remanded.

FROM BEDFORD.

Error to the Chancery Court at Shelbyville, JOHN P. STEELE, Ch., presiding.

R. B. DAVIDSON for defendants.

FREEMAN, J., delivered the opinion of the Court.

This bill was filed by complainants, six of whom are minors, who sue by their next friend, Samuel V. Blanton, against John F. Hall, agent of Abby, Gibson & Co., John-

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son Townsend, a constable of Bedford County, and the said Abby, Gibson & Co., charging that they were the children of Caroline Blanton, formerly Caroline Vance, who was then dead. That by his last will and testament, their grand-father left to their said mother, a negro man named Joseph. That defendant Hall, and Townsend, the constable, had an execution against their father, founded on a judgment in favor of said Abby, Gibson & Co., for the sum of \$300, and had seized the said negro by virtue of the same. They then charge that said negro was not liable for debts of their father, and that he has plenty of other property, both real and personal, unencumbered, to pay said execution.

Upon these allegations, they pray for an injunction against the sale of the negro, and that he be returned to their possession, etc.

Process was issued against Hall and Townsend, which was duly served on them on the 23rd and 29th of February, 1862. No subpoena seems to have been issued as to Abby, Gibson & Co., and they have never appeared in the cause, or waived service.

In September, 1866, an order *pro confesso*, was entered against Townsend and Hall, they having failed to answer or make any defense; and on the 6th day of September, 1867, a final decree was entered, as the decree recites, against the defendants, adjudging that the slave was not subject to execution for Willis Blanton's debts, but was the property of complainant, and perpetually enjoining the sale of said slave, taxing the defendants with the cost.

Abby, Gibson & Co., file the record in this Court for writ of error, and ask a reversal of the above decree.

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The decree as to them is absolutely void for want of service of process on them, and they being the only real parties in interest, it must be reversed entirely, and the case remanded to the Chancery Court to be further proceeded in. Complainants will pay the costs in this Court, and of the decree below.

I. C. STONE, Plaintiff in Error, v. JAMES BOND.

1. JUSTICE OF THE PEACE. *Proceedings before. Pleading. Non-assignment.*
In a suit before a Justice of the Peace, the assignee of a promissory note must prove his title to the paper by evidence of the assignments under which he claims it, without a written plea by the defendant denying the assignment.
2. GUARANTY. Want of consideration for a guaranty can not affect the right of an innocent holder, for value, without notice.

FROM DE KALB.

Appeal from the Circuit Court, M. M. BRIEN, J., presiding.

R. CANTRELL, for plaintiff in error.

A. A. SWOPE and J. A. NESMITH, for defendant.

DEADERICK, J., delivered the opinion of the Court.

Suit was brought before a Justice of the Peace of DeKalb County, by defendant in error, upon the following note:

“SMITHVILLE, TENN., Jan. 6, 1863.

“For value received, we, or either of us, promise to

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pay Iraby Stone, or order, eighty-seven dollars and thirty-five cents, bearing interest from this date, January 6, 1863.

“J. L. DEARMON, [L. S.]

“E. W. TAYLOR, [L. S.]

“WM. G. FOSTER, [L. S.]”

On 6th April, 1863, Stone, the payee, assigned the note as follows: “For value received, I assign this note to J. M. Allen, and guarantee its payment, and also waive demand and notice.”

J. M. Allen assigned to plaintiff as follows: “For value received, I assign this note to James Bond, and guarantee the payment; also waive demand and notice. October 30th, 1866.”

Judgment was rendered in favor of the plaintiff, from which defendant Stone alone appealed to the Circuit Court. Upon the trial of the cause the defendant objected to the reading to the jury of the assignment by Allen to Bond, upon the ground that its execution had not been proven. The objection was overruled, and the assignment allowed to be read.

This was error. If the suit had been commenced in the Circuit Court, the assignee could not have been required to prove the assignment, unless it had been denied by plea; but originating before a Justice of the Peace, no written pleading is required in such a case, and this defense, not being required to be sworn to, may be made orally on the trial.

The plaintiff was bound to show that the title or right to the note sued on was in him; and the suit being in his own name, he should have proved the assignment to him.

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The suit in this case, was not against Allen, and section 3777 of the Code has no application to this case. The proof of the signature or assignment was not necessary to charge Allen, but to make out plaintiff's right to maintain his action.

Allen is now a competent witness, and whether his rejection by the Court for the reason stated was proper, is of no practical consequence now.

But Allen is not a mere indorser of the note. His undertaking is very different from that which attaches to an indorser in the usual form. He has guaranteed the payment of the note, and his obligation amounts to an absolute engagement to pay the money, if the maker did not. And Stone's being of similar character, he is equally bound. Both of them, by their guaranty, have given credit to the note, and even if there was a want of consideration for the assignment of Stone to Allen, it could not affect their liability to an innocent holder of the note, especially if he took it without notice, and for a valuable consideration.

But for the error above indicated, the cause must be reversed, and remanded for a new trial.

Bank of Tennessee v. Wm. Cannon.

BANK OF TENNESSEE v. WM. CANNON.

1. SUPREME COURT. *Jurisdiction. Motion.* A motion lies in the Supreme Court against a Sheriff, for failing to return an execution issued from that Court.
2. JUDGMENTS. *Several for same debt. One motion against Sheriff.* Where two judgments are rendered for the same debt against different parties, and executions issued, on a motion against a Sheriff for default in returning the executions, the Court will only render one judgment against the Sheriff.

MOTION IN SUPREME COURT.

Motion entered by JAMES W. MCHENRY, for the plaintiff.

SWOPE, for the Sheriff, insisted that this was not within the appellate jurisdiction of the Court, citing *State v. Bank of East Tennessee*, 5 Sneed, 573; *Waters v. Lewis*, 9 Yer., 15; *Miller v. Conlee*, 5 Sneed, 432; *Ward v. Thomas*, MS., Nashville, 1869; Code, 4496. This is a suit: *Young v. Hare*, 11 Hum., 303; 1 Sneed, 201.

DEADERICK, J., delivered the opinion of the Court.

On the 8th of December, 1859, the plaintiff obtained in this Court a judgment against George W. Christian and Jefferson D. Goodpasture, for \$2,389.60, and \$28.48 costs. On the 6th of December, 1859, plaintiff also obtained in this Court a judgment against David Graham, Jesse Arledge, and Wm. E. B. Jones, for \$2,387.10, and \$28.61 costs. On the 10th of February, 1860, executions were issued upon said judgments, and came to defendant's hands, as Sheriff of Overton county, on the 9th of May,

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1860. The Sheriff having failed to make return of said executions, the plaintiff entered his motion on the 6th of December, 1866, in this Court, for judgment against him for failure to make due and proper return of said executions; for false and insufficient return thereof, and for failure to pay over money collected on said executions, no return of said executions having been made.

This Court has the jurisdiction, as necessarily incident to its appellate jurisdiction, to render judgment, upon motion, against the Sheriff, for default, in the discharge of his duty to make due and proper return of such executions to this Court. Both of said judgments were rendered upon the same cause of action. The defendants were all jointly sued upon a bill of exchange in the Circuit Court of Overton county, part of them appealing at one time, and part at another, so that, although plaintiff has two judgments, it is entitled to but one satisfaction.

From the evidence, it appears that before any motion was entered in this case, George W. Christian, a defendant in one of the executions, paid to the attorney of the Bank, \$75; and that he also paid the President of the Bank, on the 9th of June, 1863, \$2,571. These two sums should be deducted from the amount due upon either of the executions, at the election of the plaintiff; and the motion for judgment for the default of the Sheriff as to the other execution will be discharged and disallowed, except as to costs incident thereto and judgment will be rendered here against the defendant for the balance found due upon the execution, for the non-return of which the plaintiff may elect to prosecute his motion against the defendant, and interest thereon up to the rendition of said

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judgment, and for 12½ per cent. damages upon this aggregate sum, and the costs upon both the judgments in this court.

This we hold to be the true construction of section 3594 of the Code, authorizing a judgment against a Sheriff for his failure to make a due and proper return of an execution placed in his hands for collection. The provision of that section is, that "judgment by motion may be had against any Sheriff, to whom an execution is directed, and by him received, for the amount due upon such execution, and 12½ per cent. damages" for failure to return, etc.

In the cases of *Young v. Donalson*, and *Dunnaway v. Collier*,¹ decided at the present term of this Court, it has been held that the 12½ per cent. damages given, are to be computed upon the amount due upon the execution at the time of the rendition of the judgment.

The judgment will be entered in conformity to this opinion.

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J. R. SELLARS, in Error, v. WM. SELLARS, Ex'r.

1. WILL. Devisavit vel non. *Evidence. Declarations of subscribing witness.* On the trial of an issue, *devisavit vel non*, the evidence of the declarations of a deceased subscribing witness, that the testator was of unsound mind at the time of the execution of the will, is not admissible in evidence.²

¹ Ante, 52, 10.

² See Acc. *Weatherhead v. Sewell*, 9 Hum., 272.

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2. SAME. Same. Same. *Petulant reproaches, not admissions. Error. Evidence must be material.* The petulant reproaches of an old woman, in calling her husband "an old fool," and in saying he was deranged when provoked at him, being offered as evidence of admissions of the mental condition of the testator, and excluded, it was held not to be error, on the ground that they ought not to have had, and would not have had, any influence on the verdict.

FROM DEKALB.

In the Circuit Court, A. McCLAIN, J., presiding.

CLARK, CROWLEY & SMALLMAN, for plaintiff in error, cited, on admissions of parties, *Brown v. Moore*, 6 Yer., 277.

S. M. FITE, with them, cited, on the competency of declarations, *Rose v. Allen*, 1 Cold., 23; 1 Redfield on Wills, 142, 143, note; *Ib.*, 96; 2 Greenl. Ev., § 690; *Overton v. Hardin*, 6 Cold., 375. Admissions: 6 Yer., 272; 2 Greenl. Ev., § 690; 1 Meigs' Dig., 868.

R. CANTRELL, for defendant.

DEADERICK, J., delivered the opinion of the Court.

This is an issue of *devisavit vel non*, tried in the Circuit Court of DeKalb County; verdict and judgment were in favor of the will, and the defendant below appealed in error to this Court.

Upon the trial below, the execution of the will was proved by one of the attesting witnesses, who proved, also, the attestation of Durham, the other witness, who was proved to be dead.

The defendant below then introduced several witnesses, by whom he proposed to prove declarations of the

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deceased attesting witness, made after his attestation of the will, to the effect that the testator, at the time of the execution of the will, was of unsound mind. This evidence was objected to by the plaintiff, and was excluded by the Court.

In this there was no error. Durham, the deceased witness, by putting his name to the will of Matthew Sellars, the testator, in legal effect asserted the mental capacity of the testator and the due execution of the will, and the swearing against his own act and declarations, if he had been alive and introduced as a witness, would have been an imputation upon his credibility: 1 Cold., 28.

This, however, he might have done. But his simple declarations or statements, in regard to the capacity of testator, made without the sanction of an oath, and in disparagement of the evidence furnished by his attestation of the will, are wholly inadmissible: 1 Greenl. Ev., § 126.

The defendant also offered to prove by Barnes, that testator's wife had said, in a controversy with him about selling some bacon to the witness, that he, testator, was an "old fool;" and upon another occasion, when Smith had gone to see testator to buy a yoke of oxen, that the old lady said that the old man was deranged. This evidence was offered as an admission of a party having an interest in, though not a party to the suit, and being objected to, was excluded.

It is certainly true, that the declarations and admissions of a party to a suit, or of one having an interest in its result, in regard to the subject matter of the

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suit, are admissible against him; yet the circumstances under which these statements were made, show that they were the petulant reproaches of an irritable and impatient old woman, rather than an expression of an opinion as to the condition of the testator's mind. We are satisfied these statements ought not to have had, and if admitted, would not have had, any influence upon the verdict of the jury.

Defendant, after the verdict was rendered against him, in support of his application for a new trial, read his own affidavit and those of several other persons, showing that he had discovered, since the trial, that he could make additional proof to establish testator's incapacity to make a will.

There is much proof of this character already in the record; and this Court has repeatedly held that it will not grant a new trial upon the ground of newly-discovered evidence, where it is merely cumulative.

There is no error in the charge. The verdict is sustained by sufficient evidence, and we affirm the judgment of the court below.

Thomas Lancaster v. John L. Arendell.

THOMAS LANCASTER, Plaintiff in error, v. JOHN L.
ARENDELL.

1. EVIDENCE. *Practice. Petition for discovery.* A party filing a petition for discovery, has no right to read his petition in connection with the answer, unless it is necessary to a proper understanding of the answer; and it is error for the Court to allow the reading of such petition, although he instructs the jury at the time that it is not evidence.
2. SAME. *Same.* In jury trials, evidence not properly admissible should, if possible, be excluded *in limine*, so that it may not be heard by the jury.
3. ORDER. *Assigned. Protest and notice.* Assignee of an order can not recover on the order against the maker without protest and notice of the refusal of the drawee to accept.
4. SAME. *Question reserved. Is an order negotiable?* Whether an assignee of an order can sue upon it in his own name. *Quere?*
5. NOTES. *For dollars. Presumption as to value.* A note for dollars, drawing interest from date, taken as a payment, is not presumed, in the absence of proof, to be taken at a discount, but at its nominal value.

Cases cited: *Jones v. Davidson*, 2 Sneed, 467; *Porter v. Dillahunty*, 8 Hum., 575.

Code cited: 3898, 1959, 1961, 1962.

Statutes cited: 1848, c. 177; 1762, c. 9, s. 4.

FROM SMITH.

In the Circuit Court, before S. M. FITE, J.

JOHN W. HEAD & SON, for plaintiff in error, cited Code, 3890 to 3900.

J. B. LUSTER, for defendant, cited *Jones v. Davidson*, 2 Sneed, 447. W. H. DEWITT, with him.

NELSON, J., delivered the opinion of the Court.

In the progress of this civil action, which was brought

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by defendant in error for work and labor done by him as a mechanic, in building a house, etc., and in which the plaintiff in error claimed a set-off and a recoupment of damages for the defective and unworkmanlike manner in which the work was executed, the defendant in error filed a petition for discovery under the provisions of the Code. The record states that "the plaintiff first proposed to read his bill of discovery and the defendant's answer thereto. Defendant objected to the reading of the bill, and insisted that plaintiff was only entitled to have the answer read to the jury. The objection was overruled, but the Court instructed the jury at the same time, that the bill was not evidence before them; and the bill and answer, exceptions to answer, and amended answer, were all read; to all which the defendant excepted, but the exceptions were overruled. The Court, at the same time, instructed the jury that neither the bill nor exception to the answer were before them in the case."

This action of the Circuit Court was erroneous. The Code, 3898, provides that "the answer of the party to the petition and interrogatories, is evidence on the trial of the suit, in the same manner and with the like effect, as an answer to a bill in equity for a discovery."

In expounding the act of 1848, c. 177, which is similar to the provisions of the Code, it was said that the petition for discovery was no evidence for the party who filed it: *Jones v. Davidson*, 2 Sneed, 452, 453. In that case, the defendant had filed a petition for discovery against the plaintiff, who read his answer in evidence to the jury, and the defendant then offered to read his petition, which was ruled out on the plaintiff's objection.

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This practice was held to be irregular, and it is said, in the opinion delivered by Judge Totten, that "in the trial at law, it was proper for the defendant to produce his bill or petition for discovery, not as evidence for him, but in order to let in the respondent's answer thereto, if he intended to use it as evidence. Its office then is to prove that such a bill had been filed, and to show the matters of fact to which the respondent was interrogated; for it is as to these that the answer must be limited and confined: *Ib.*, 453.

As the Code makes no provision for the reading of the petition to the jury, the correct practice is to submit it to the court, so that the court may determine, as a preliminary question of law, whether the petition has been properly filed, and the answer is responsive thereto; and if it is so adjudged, then the answer alone, which is evidence, should be submitted to the jury, unless it appears that the reading of the bill is necessary to explain the answer. If it appears that the answer can not be understood without reading the bill, or that the bill and answer are so connected that it is necessary to submit both to the jury, this should be done, but with the explanation that the matters alleged in the bill are not to be taken as true; otherwise, the party filing the petition would become a witness in his own cause, and although this ancient and well established objection has been obviated by recent legislation authorizing the parties, with but few exceptions, to become witnesses, yet, as this case was tried before the passage of the statute, it must be governed by the rules of law existing at the time of the trial. Although it has been held that the Circuit Court

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may, at any time in the progress of the cause exclude evidence erroneously admitted, from the jury, this rule should only be applied in cases where witnesses make inadmissible statements before they can be checked by counsel or restrained by the court, or where the evidence has been inadvertently received without objection at the time. But where objection is formally made to the introduction of the illegal testimony, and the Court has an opportunity to determine it *in limine*, the evidence, if illegal, should not be heard by the jury. No fact is better known to the members of the legal profession constantly engaged in the trial of causes and studying the operations of the human mind, than that where evidence has once been heard by jurors ignorant of law and not trained to discrimination, it is almost impossible to efface the impressions created by such illegal testimony; and we hold, that in all cases, where it is reasonably within the power of the Court to prevent the introduction of such evidence, the question should be disposed of before the witness makes his illegal statement in the hearing of the jury. This is the more important in cases where written evidence is submitted, which the jurors always take with them when they retire from the bar. As a general rule, it is impossible to penetrate the secrets of the jury room, but judging from the revelations sometimes made by the jurors after a trial, it is not a rash presumption to suppose that the documentary evidence is often examined to ascertain what parts of it, at least, have been rejected; and such an examination rarely fails to impress the rejected evidence upon the memory, and to create an influence in the formation of jurors' opinion. It is safest and best, that

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the Judge, who is presumed to be familiar with the rules of evidence, should at once determine upon its admissibility. A week, or more, is often employed in the trial of a single cause, where the facts are complicated and the witnesses numerous. If illegal testimony were admitted in such a case, on the first day of trial, it would be scarcely possible for the Judge, in such a case, to efface, by a single sentence, the impressions created in such a time upon the mind, not only by the evidence itself, but by meditations upon it in its relations to other proof.

In his Honor's instruction to the jury, it is said: "As to the item in the defendant's plea of set off, of an order drawn by plaintiff on Thomas Fisher, in favor of one Apple, and by him assigned, as the defendant alleges, to defendants, the law is this: "If it was presented to Fisher for payment, either by defendant or Apple, and he refused to pay, and plaintiff was notified of this refusal, then the defendant should be allowed the amount of said order; but if no demand is made of Fisher, or, if made, no notice was given Arendell of his refusal, (Fisher's refusal,) to pay it, the defendant can not be allowed the amount of said order. But if this demand was made, and notice given to Arendell of Fisher's refusal to pay, defendant should be allowed this item." It may be inferred from the record that this part of the charge refers to an order, without date, drawn by N. L. Apple on John L. Arendell, the defendant in error, for \$10.60, which, it may be also inferred, was transferred or assigned to plaintiff in error by the following writing: "Mr. John Arendell, you will please pay Thomas Lan-

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caster (the plaintiff in error) the ten dollars that you owe me. N. L. Apple."

For the plaintiff in error, it is insisted that the part above quoted of his Honor's charge is erroneous. But the Code, 1961, expressly provides that no holder of an order shall prosecute suit against the drawer before the order shall have been first protested for non-acceptance, and notice thereof given to the drawer before action brought; and the charge of his Honor was unquestionably correct, if the paper can be considered as negotiable, and if the plaintiff in error, as assignee, had a right to sue upon the order, or plead it by any way of set-off. It was declared by this Court, in construing the Act of 1762, c. 9, s. 4, which, in its provisions, was very similar to the Code, 1961, 1962, that, by the common law, orders were not such evidences of debt as could be sued upon, and that the drawer, in the event of non-payment, could only be sued upon his original liability; that the statute did not make the order negotiable, nor cause it to operate as an extinguishment; but simply gave an action upon it, which, when against the drawer, must be upon demand, protest and notice. See *Porter v. Dillahunty*, 8 Hum., 575. As the Code, 1959, 1962, gives the action to the person to whom the money is made payable, and makes no provision for the assignment of the order, his Honor's charge was clearly not erroneous as to the plaintiff in error; and we do not feel called upon to declare whether it was erroneous as to the defendant in error.

It seems, from the record, that Luther Betty executed a note, on the 6th of April, 1858, payable to H. C. Sadler, on or before the 24th of December next thereafter,

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for one hundred dollars, "drawing interest from date;" that Sadler assigned the note to plaintiff in error, who indorsed the same to defendant in error, in part payment of the amount due him; and there appears to have been a controversy between the parties as to whether Arendell took the note at a discount, or received it in payment at its nominal value.

Among other things, his Honor charged the jury that if there was no proof of contract between the parties as to the terms upon which the note was taken, "it would be governed by the principles applicable to property taken, without a contract, upon a cash contract; that is, defendant should suffer such discount upon it as was reasonable or usual upon such paper at the time it may have been taken." In this there was error. The note was for dollars, and is made negotiable by statute. It stands upon the footing of all commercial paper, and, in the absence of proof to the contrary, is presumed to have been taken at its nominal value. Had the Court, without this addition to his charge, left it to the jury to determine, from the proof, on what terms the note was taken by the contract, the charge would have been correct.

For the causes herein stated, let the judgment be reversed, and the cause remanded.

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1. JUDICIAL NOTICE. *Coin. Disappearance of, during the war.* The Courts will take judicial notice of the fact that during the late war, gold and silver disappeared, as a circulating medium, in the Southern States.
 2. SAME. *Acts of States.* The Courts take notice, as a part of the history of the country, that Missouri had Representatives in the Provisional Congress of the Confederate States, prior to December, 1861, and was admitted into the Confederacy in December, 1861, and was represented there until the end of the war.
 3. SAME. *Lines of occupation. Residents of contested States.* The Court can not judicially know where the fluctuating lines of contending armies were at given dates, nor whether a citizen of Missouri resided within the Federal or Confederate lines on the 19th of December, 1861.
 4. AGENCY. *Ratification.* A principal can not ratify the act of an agent in part, and disaffirm it in part. A ratification as to part operates as a confirmation of all.
 5. SAME. *Personal liability of agent. Exchange of funds.* An agent acting in good faith is not to be made personally responsible, if in times of danger and difficulty he makes the best disposition in his power for the preservation of moneys in his charge, though it involve the exchange of funds of a less portable for those of a more portable kind, as of small bills for larger ones.
 6. SAME. *Right to receive bank notes.* Payment to an agent, during the war, of the purchase money of land, sold by the agent, under a power to sell on such terms as he might think best, in Southern bank notes, that being the best currency in circulation at the time, was a good payment.
- Cases cited: *Conley v. Burson*, 1 Heis., 145; *Shurer v. Green*, 3 Cold., 427; *Draper v. Joiner*, 9 Hum., 612; *Peck v. James*, 3 Head, 75; *Mason v. Whitthorne*, 2 Cold., 242; *Crutchfield v. Robins*, 5 Hum., 17.
7. WRIT OF ERROR IN CHANCERY. *How far defendant in error may take benefit under.* A writ of error in a chancery proceeding brings up the case so far that compensation denied below to an agent, defendant, may be allowed in the Supreme Court, upon error prosecuted by the principal, the complainant, in a case seeking a recovery and account in the matter of the agency.

Cases cited: *Morris v. Richardson*, 11 Hum., 392; *Maskall v. Maskall*, 3

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Sneed, 209, 210; *Furber v. Carter*, 2 Sneed, 2; *Whiteside v. Hickman*, 2 Yer., 358; 4 King's Dig., § 11,264; *Gilchrist v. Cannon*, 1 Cold., 590; *Ross v. Ramsey*, 3 Head, 15; 3 Yer., 373.

Code cited: 3155, 3159, 3172.

FROM BEDFORD.

Error to the Chancery Court at Shelbyville. The decree was rendered by J. P. STEELE, Ch., at the September Term, 1867, declaring that the complainant was bound to receive bank notes, received by the defendant as his agent, and referring it to the Clerk and Master to take proof, and report upon the amount and kinds of Southern funds so received, and the expenses of collecting it; but denying to the defendant any right to recover any compensation for services as such agent. Complainant prosecuted a writ of error from this decree.

J. L. SCUDDER, for complainant, cited: 9 Hum., 612; 2 Cold., 242; 3 Head, 75; Sto. on Contr., § 162; 1 Heis., 145, 711.

H. L. DAVIDSON, for defendant, cited: Story on Agency, §§ 250, 253; *Evans v. Buckner*, 1 Heis., 291.

NELSON, J., delivered the opinion of the Court.

In a power of attorney, executed by complainant on the 19th of December, 1860, authorizing the defendant to sign the name of complainant to a certain deed of partition, it is provided, among other things, as follows: "I, the said Jesse Wood, do hereby further authorize the said John L. Cooper to enter into and take possession of the real estate conveyed to me in the above described

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deed, and to bargain, sell, grant, convey and confirm the said land, for such price or sum of money, or on such terms, as he may think best." The power also authorizes the attorney in fact to execute deeds of conveyance, with warranty; to rent the land until he can sell it; to demand, receive and collect all sums of money which shall become due and payable by such sale or sales;" to dispose of the rents, and "to do and perform every act and thing whatever, requisite and necessary to be done in and about the premises."

The tract of land, the sale of which was thus authorized, contained 63 $\frac{3}{4}$ acres, and adjoined a tract of about 90 acres, owned by W. M. Wood, the brother of complainant; and the defendant was also the agent, or attorney in fact, of W. M. Wood. On the 19th of December, 1861, the defendant sold the two tracts to James A. Jarrett, for \$3,800, and executed to him a title bond in the names of complainant and W. M. Wood. He took the note of Jarrett for \$486, due 25th of December, 1862, in part payment of the purchase money, and notes on other solvent parties, in different amounts, for the residue; none of the notes falling due at a later date than the 25th of December, 1862. These debts, or the greater part thereof, were collected by the defendant during the year 1862, partly in notes of the South Carolina and Georgia banks, and, in part, in notes on the Bank of Tennessee, and the Union and Planters' Banks.

Although the number of acres in the two tracts was different, the smaller tract of complainant was equal in value to the larger tract, belonging to W. M. Wood, and the defendant, therefore, treated each of the owners as

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being entitled to \$1,800 of the purchase money. The defendant also received \$150 as rents of said property, of which amount he transmitted \$100 to the complainant, and applied the residue to the payment of taxes, and in the purchase of a wagon for the removal to Missouri of the negroes then belonging to complainant and his brother.

The complainant was a citizen of Missouri, where he executed the power; and he filed his bill on the 28th of February, 1866, in the Chancery Court at Shelbyville, against the defendant, to compel him to account for the tract of land at \$35 per acre, and also for the rents, and certain profits alleged to have been made by defendant from a conversion of the fund and certain speculations in which he engaged. The bill treats the fund realized, or which should have been realized, from the sale of the land, as belonging to complainant, and assumes that the title of Jarrett, the purchaser, "is perfect and complete."

It appears that complainant, being dissatisfied with defendant, appointed W. N. Gwinn attorney in fact, in his stead; and that, in the month of January, 1866, shortly before the bill was filed, defendant made two payments to said agent, amounting to \$961.75. The defendant denies that he engaged in any speculation, or realized any profit, upon complainant's funds, and there is no proof to contradict his denial. It is stated in the answer, and shown in evidence, that, after he received the purchase money, the defendant attempted, during the late civil war, to communicate with complainant, but found it extremely difficult to do so; and being afraid of depredations by the soldiery, he employed unusual and extra-

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ordinary means to shield the money which he had collected from their discovery. He kept it, generally, between the lids of an old book, from which the leaves had been torn out, and hid the book, at one time, beneath a parlor chair; at another, in his buggy-house; and yet at another, in his book-case and finally, being under great apprehension that the money might be discovered and stolen, he divided his funds, consisting of his own money and the money realized from the sale of the land, and deposited part of it, in May, 1863, with his brother, under the belief that two chances of taking care of it were better than one. His brother also kept the money in a book, and states that at the time Gen. Bragg's army left the neighborhood, on the approach of the Federal forces, which was about the 17th of June, 1863, he (the witness) owned some cattle, which he wished to keep out of the way of the Federal army; and having heard firing between them and the Confederate forces after he started from home, and regarding it as uncertain when he could return, he sent his nephew back after his money, and his wife sent him the book just as it was tied up, not knowing, as he supposes, that complainant's money was in it. Witness went South, and remained away until November, 1863, when he returned to Bedford county, and restored to complainant the \$800 he had received from him, with the exception that one of the bills returned was a \$100 bank note, for which he had exchanged to that amount the \$5 Georgia notes which he had received. Witness states that the greater part of the money he returned was the identical money he had received; and there is no proof that either he or complainant embarked

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in any speculation whatever. It further appears that Gwinn, the second agent of complainant, sent to complainant \$700 of the amount he had collected, in United States Treasury notes, commonly called "greenbacks," and received a letter from him, acknowledging the receipt thereof, under date of March 14, 1866, after the commencement of this suit.

It is in proof that defendant sold the land for a fair price; and there is no evidence to show that he was limited, by his instructions, to sell for not less than \$35 per acre. If such evidence were admissible, which may well be doubted, it would require the clearest and most satisfactory proof to countervail the provision in the written power, that the attorney in fact, was to sell for such price or sum of money, or on such terms, as he might think best." See Story on Agency, § 198, 4th ed.

There is evidence in the record, tending to show that defendant said, in conversation, he had sent part of the money by his brother, to the South, to trade on, and that he complained of his brother for not returning the money received; and it is also shown that the rents, or their proceeds, were paid to, or realized by, complainant, as stated in the answer.

Thomas H. Coldwell proves that "up to about the middle of March, 1862, Southern bank notes were about equal to our best banks in Tennessee, and some persons thought they were better; and William S. Jett, Cashier of the Shelbyville Bank, states that, during the year 1862, and in the early part of 1863, the notes of all Southern banks were in good standing and at par, in the payment of debts due the bank, and that within the period stated,

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as much as fifty, and possibly one hundred, thousand dollars were received in payment.

It is also in proof, that current bank notes, as compared with gold and silver, were greatly below par; but as the Court may judicially know, "any matters of public history, affecting the whole people," and "whatever ought to be generally known within the limits of their jurisdiction," see 1 Greenl. Ev., §§ 5, 6, we attach, in this case, but slight importance to this evidence, for the reason that it is generally, and perhaps, universally known, that during the late civil war, gold and silver disappeared entirely, as a circulating medium, in the Southern States, and became the subject of especial contract in the very few instances in which contracts were made as to that species of currency.

From the evidence in this cause, it is impossible to escape the conclusion that the defendant, as attorney in fact, acted with the utmost fairness and integrity, and more than ordinary caution; for he was far more successful than the masses of the people, during the late civil war, in shielding his own and complainant's money from the prying scrutiny and thievish cunning of straggling and undisciplined soldiers, who, in innumerable instances, robbed and plundered, without fear and without punishment, the peaceful, unarmed, unresisting, and, far too often, uncomplaining citizen.

It is now insisted, in argument, that the contract made by the agent was unlawful, and incapable of ratification, because the complainant was a citizen of Missouri, and the agent and purchaser were citizens of Tennessee at the time when the contract for the sale of the land was made;

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that it was made during the late civil war, and that the power of attorney was revoked by the war, according to the principle established in *Conley v. Burson*, 1 Heis., 145. To this, it may be answered that the pleadings and proofs in this cause were made up without any reference to that opinion; that the transcript was filed about three years before the opinion was delivered; and although the principle of law was the same at the commencement of the suit as at present, yet there are no allegations in the bill, or admissions in the answer, upon which the question can be raised.

As part of the history of the United States, and of the late civil war, we take judicial notice of the fact that Missouri had representatives in the Provisional Congress of the Confederate States, prior to December, 1861, and was admitted into the Southern Confederacy at the fourth session of the Congress of the Confederate States of America, in December, 1861, and had Senators and Representatives in the Congress of the Confederate States until the close of the war: See McPherson's Hist. Rebellion, 400, 402.

We also judicially know, as part of the history of the country, that fierce battles were fought in the State of Missouri between the armies of the United States and those of the Confederate States; but we do not judicially know the fluctuating lines of those contending armies, and there is nothing in the pleadings or proof in this cause, to show whether the complainant resided within the lines of the Confederate, or within those of the Federal Army, on the 19th December, 1861, when the defendant executed the title bond to Jarrett. We can not, therefore, assume that

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the contract was illegal, or the power of attorney revoked. On the contrary, we are bound to presume that the contract was legal, according to the familiar maxim that "everything is presumed to be rightly and duly performed until the contrary is shown."

It is stated in the answer of defendant, that "in consequence of the war, all practicable means of communicating with complainant in Missouri, were cut off, so that respondent could neither get a letter to him, or the money, although he tried to communicate with him by letter, and saw no opportunity to send him the money, and was obliged to keep it, and insists complainant is bound to receive it." In the answer of the complainant to defendant's cross bill, it is admitted that he received two letters from complainant; one of them dated in 1864, in which he was notified of the sale of the land; but while he denies that said letters contained any information as to the payments made in current bank notes, he states that he has so lost, or mislaid, the two letters, that he can not find them. Complainant further states, in said answer, that he was in the army up to July, 1865, but does not state when he entered it, or to what army he belonged.

These vague statements in the pleadings do not raise any question as to the supposed illegality of the contract of sale to Jarrett. Assuming, therefore, that the contract with Jarrett was legal and susceptible of ratification, if it needed any, we hold that complainant has fully ratified said contract, not only by filing this bill to recover from his agent the value of the land or the amount of purchase money in "*greenbacks*," but by the reception of part of the purchase money as already stated, after he was fully

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informed of the facts on his visit to Bedford County, in the Fall of 1865. It is well settled that "a principal cannot, of his own mere authority, ratify a transaction in part, and repudiate it as to the rest. He must either adopt the whole or none. And hence, the general rule is deduced that, where a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent;" and a ratification made upon full knowledge of all the material circumstances, becomes, in that instant, obligatory, and can not afterwards be revoked or recalled: See Story on Ag., § 250, 4th ed., and the cases there cited, *Ib.*, § 251; *Shurer v. Green*, 3 Cold., 427, 428.

It is next insisted for complainant, that the defendant mixed and blended the money he received with his own money or that of others, so that the same can not now be identified or delivered in specie, and that he is therefore liable; and in support of this proposition the counsel cites *Draper v. Joiner*, 9 Hum., 612; *Peck v. James*, 1 Head, 75, and *Mason v. Whitthorne*, 2 Cold., 242. There can be no doubt, if the doctrine as to "confusion of goods" is applicable in a case like this, that if an agent acting contrary to instructions or the common usage of trade, wilfully so intermixed the property or funds of his principal with his own, as to produce a confusion of goods, he will be responsible; but if he acts in good faith, and takes the same care of the fund that he does of his own, and the intermixture is not detrimental to the interests of his principal, no personal responsibility attaches to his act. In *Draper v. Joiner*, a guardian sold a slave, the property of his ward, at a place different

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from that specified in the order of the Court, took notes payable to himself, at the rate of ten per cent., delayed a report of the sale two years, until the purchasers became insolvent, and accounted only for six per cent. interest, and he was justly held accountable for his fraud. In *Peck v. James*, where a County Trustee had received notes of the Bank of East Tennessee, which failed, it was held that he was bound to establish the identity of the fund, in order to prevent fraud. In *Mason v. Whitthorne*, it appeared that Whitthorne, who was a Clerk and Master, had received money in that character, and deposited it in his own name in bank; that, as a Director, he had voted to remove the assets of the bank to Chattanooga; that an order was made directing the depositors to draw out their deposits; and that, instead of drawing them, he took from the Cashier a check on the Bank of Augusta, Georgia, and on presenting the same, was answered that they had no funds of the Branch Bank of Tennessee at Shelbyville. In that case, it was held that, "by mingling the trust fund with his own money, and depositing the same in the bank, in his own name and to his own private account, to say nothing of his participation in the removal of the assets of the bank, or his failure to withdraw his deposits, upon notice from the bank, and the acceptance of a check in lieu thereof; he treated the money as his own." But, in the case under consideration, there were no acts of ownership, no disobedience of any instructions established by proof, no fraud, and no especial profit or advantage to the defendant. It is remarkable that he was able to keep the fund at all, during the prevalence of the most rigid

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and annoying practices of war. The principles applied to a confusion of goods are inapplicable to a case like this. When a wrong-doer intermixes his corn or hay, wilfully, with that of another, so that it becomes impossible to distinguish what belongs to each, the whole belongs to him whose property was invaded; but if the goods can be easily distinguished and separated, no change of property takes place: 1 Kent, 6th ed., 365. So it is, in many cases, the duty of an agent to keep the property of his principal separate from his own, and not to mix it with the latter; and if he does not keep it separate from his own, in cases where it is properly his duty, and afterwards he is unable to distinguish between the one and the other, the whole will, as a sort of penalty for his negligence, be adjudged to belong to his principal: Story on Ag., 4th ed., § 205. But this rule is generally applied only in cases of fraud and gross negligence: 1 Story's Eq., § 623; *Ib.*, § 469. It usually embraces ordinary articles of personal property, to which some specific value is attached, and is not applicable to current bank notes, issued by the same banks, which are ordinarily of the same value, and as to which any damages resulting from their appropriation can be readily ascertained. In the case before us, the defendant states that he received in payment for the land, or of the notes which he took for purchase money, bank notes on the banks of several States named in his answer. He names the persons from whom he received them, but states, distinctly, that he "laid the money away for complainant, keeping it separate and apart from his own;" and although he may have kept it in the same book

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with his own funds, and some "confusion" may have resulted from his placing part of it in the hands of his brother for safe keeping, yet it is a sound legal principle, that "extraordinary emergencies may arise, in which a person who is an agent, may, from the very necessities of the case, be justified in assuming extraordinary powers; and his acts, fairly done under such circumstances, will be binding upon his principal:" Story on Ag., § 141. The delivery of the money to his brother for safe keeping, was an act of precaution justified by the circumstances; and the exchange by him of smaller notes for larger ones, so as to reduce the bulk of the funds he carried about his person, and to enable him to keep them more securely, was a prudential measure, extremely necessary to the safe keeping of the fund in a time of war and general robbery.

In *Crutchfield v. Robins, Tingley & Co.*, 5 Hum., 17, it was held that a payment of an execution to a Sheriff, in current bank paper, was a payment in money; and we hold that, as the agent was not limited by the power, to gold and silver, or any particular kind of money, and was authorized to sell "on such terms as he might think best," he had the right to receive current bank notes, which were, at the time he received them, the best currency in circulation, and, as the proof shows, were received at the time by the banks, and treated as "par" in all ordinary transactions.¹ The general doc-

¹ In *Diets v. Mitchell*, January 18, 1871, this doctrine was approved as to debts due to an executor, which the debtor insisted on paying, received in Southern bank notes, when they were the best currency in circulation, and the choice was between them and Confederate notes; and also, as to other debts collected in Southern bank notes, which it did not appear were pressed upon the executor.

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trine, as stated in *Shurer v. Green*, 3 Cold., 426, should be thus qualified. The Chancellor's decree is, therefore, affirmed, with the modification that the agent having acted in good faith, is entitled to the ordinary compensation for his services, and will not be charged with interest unless he actually received it. Complainant will pay the costs in this Court.

Let the case be remanded for an account.

On the 21st day of January, the following additional opinion was delivered:

In this case, upon the suggestion of counsel for complainant, we agreed to reconsider so much of the former opinion as declares that the defendant, who did not appeal from the judgment, should be entitled to compensation for his services as agent. The opinion, on this point, was founded upon the cases in which it has been held that an appeal in equity brings up the whole case. See *Morris v. Richardson*, 11 Hum., 392; *Maskall v. Maskall*, 3 Sneed, 209, 210; *Furber v. Carter*, 2 Sneed, 2; *Whiteside v. Hickman*, 2 Yer., 358; 4 King's Tenn. Dig., 229, § 11264.

The appeal in Chancery is regulated by the Code, sections 3155, 3159, and the appeal in the nature of a writ of error by 3172. Section 3155 authorizes a reëxamination of the whole matter of law and fact appearing in the record. Section 3159 allows any one or more of the parties to appeal, "the judgment remaining in full force against such of the parties as do not appeal."

In *Gilchrist v. Cannon*, 1 Cold., 590, it is said that

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the proceedings in a cause may, in their nature, be divisible, or the same suit may contemplate different objects." Construing 3155 and 3159 together, we are of opinion that it was competent for the complainant to have prayed an appeal from that part of the decree, only, with which he was dissatisfied; but as he prayed a broad appeal from the entire decree, his appeal brought up the entire cause, and did not leave the judgment in force as to the defendant not appealing. There are many cases where there are separate and distinct judgments as to different defendants; and the intention of the statute was to cover such cases, where the interests of defendants are different; not cases like this, where the *gravamen* of the bill relates to a single subject of agency, and no part of the duties or liabilities of the agent could be brought under review here without considering the whole subject. In *Ross v. Ramsey*, 3 Head, 15, it was held that a *pro confesso* upon a bill which makes no case against a defendant will not support a decree. See, also, 3 Yer., 373. As the complainant brought up the entire cause, and it is manifest that the Chancellor erred in not allowing compensation to a faithful agent for his services, and as it will be indispensable to take an account, he should not be held to have abandoned his right to compensation by not appealing.

Jo. C. Bowers *et als.* v. P. S. Lester, Adm'r, &c.

JO. C. BOWERS *et als.* v. P. S. LESTER, ADM'R, c. t. a.

THE COUNTY COURT. *Jurisdiction of. Legacies and filial portions.* The County Court has no jurisdiction of a petition filed against an executor or administrator, with the will annexed, to recover a legacy of specific amount, \$100, admitted to be in his hands and due, but which he insists he has paid, and on which a contest is made over the validity of the payment.

Cases cited: *Bond v. Clay*, 2 Head, 379; *Deaderick v. Smith*, 6 Hum., 138; *Planters' Bank v. Fowlkes*, 4 Sneed, 461; 5 Sneed, 380.

Code construed: 2312, 2313, 2314.¹ Cited: 2295, 2311, 2315, 2316, 4180, 4196, 4204.

Statutes cited: 1789, c. 23, ss. 2 and 3.

FROM WILSON.

A petition was filed in the County Court, against Lester, administrator with the will annexed, of Eli E. Eason, to compel him to pay over a legacy of \$100, with interest, to which he answered, admitting the right to the legacy, but insisting that he had paid it. This was contested, on the ground that it was paid to the petitioner while under age, and in Confederate treasury notes. The Court declared that he had not paid the legacy, and ordered its payment, rendering judgment against him and his security; and from this order the defendants appealed to the Supreme Court.

WILLIAMSON & MARTIN, for appellants, took exceptions to the regularity of the proceedings, that H. D. Lester, the security, was not made a party, citing *Hughes*

¹ Taken from the Act of 1762, c. 5, s. 23.

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v. *Bryan*, 6 Yer., 471; that this case was consolidated with another, and improperly heard separately; and that the answer showed that the estate had not been collected, and was not in the administrator's hands, and so he was not liable to a judgment personally.

R. CANTRELL insisted that Confederate treasury notes paid to an infant could not be allowed.

TURNEY, J., delivered the opinion of the majority of the Court, NELSON, DEADERICK and SNEED concurring.

The proceedings in this matter must be dismissed for want of jurisdiction of the County Court, in which they were instituted, over the subject matter.

The petitions were filed under §§ 2312, 2313 and 2314 of the Code, contained in an Article, entitled, Distribution of Estates, in the words:

"Any distributee or legatee of the estate, may, after the expiration of two years from the grant of letters, apply to the County, Circuit or Chancery Court of the county or district in which administration was taken out, to compel the payment of his distributive share or legacy."

"The application shall be by bill or petition, shall set forth the claim of the applicant as legatee or distributee, shall allege that the assets of the estate are more than sufficient to pay the debts, charges and other claims, if any, entitled to priority, and be verified by affidavit."

"The proceedings under such application shall be conducted as other equitable actions, and heard and determined summarily as soon as practicable."

To ascertain whether the petitioners are entitled to pro-

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ceed in this case, under the foregoing sections, we must construe them in conjunction with sections 2315 and 2316, which are:

“An affidavit before a Commissioner of Tennessee, or before any Consul, or Notary Public, as to the pedigree or heirship of any person, may be received as evidence thereof by any executor, administrator, or other person or tribunal having the partition and distribution of property or estates.”

“But every legatee and distributee, before receiving his portion of the deceased's estate, or some other for him, shall give bond, with two or more able sureties, in a penalty double the amount of his share, payable to the State, conditioned that if any debt or debts, truly owing by the deceased, shall be afterwards sued for and recovered, or otherwise duly made appear, said legatee or distributee shall refund and pay his ratable part of such debt or debts out of the part or share so allotted to him.”

It is evident, from the language of this statute, that it was the purpose of the Legislature to confer upon the County Court merely a power to ascertain, from the records of the Court, of the settlements of the executor or administrator, the condition of the personal estate from which the legacy or distributive share is claimed, and to do this by crediting the trustee with proper disbursements, and charging him with assets in his hands, striking a balance, and then by simple calculation, ascertaining the share of the distributee or legatee, and upon this to make an order for the payment of the interest thus *summarily* ascertained.

It could not have been contemplated that the County

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Court should have jurisdiction to construe wills, to try questions of set off, pass upon complicated accounts between the executor and distributee or legatee, to try questions of infancy, or other controverted fact, as it must do in this case, if it determine the matter at all. These are matters of litigation, which can not be tried in *summary* proceeding.

Under this statute, the only power the County Court has, is simply to order the payment of the legacy or distributive share readily ascertained without complication or plausible dispute, and without issue or litigation.

It was not intended that the executor or administrator should answer, with a view to litigate and contest. The petition is only to perform the office of a notice in a *summary* proceeding, the statute expressly declaring that the proceeding shall be *summarily* heard, and determined as soon as practicable.

Certainly, if more was intended, or if the jurisdiction indicated by the proceedings in this case, had been the object of the Legislature, there would have been more definiteness in the Act of Assembly. It would have provided for process to bring the executor or administrator before the court. It would have provided for the enforcement of the liability of his securities upon his bond. It would have prescribed the term of the court to which the proceeding should have commenced—whether the monthly or quarterly—and would have invested the Court with the power to issue execution against the executor or administrator and his securities; all of which essentials are absent from the law, and cannot be supplied by intendment or implication. The County Court is one of lim-

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ited, and not general jurisdiction, and it has been the policy as well as the duty of the courts, to confine it to such jurisdiction as the Legislature in terms conferred, and not to enlarge by construction a jurisdiction out of which much ruinous litigation has already resulted. See *Bond v. Clay*, 2 Head, 379.

This construction of the law is made conclusively correct by section 2315. Can it be for a moment presumed that the Legislature intended to authorize any Court, in matters of contest, to treat as evidence the *ex parte* affidavit of any one, however honorable or reliable, to ascertain the rights of litigant disputants, without giving the adversary of him who produces such affidavit, the opportunity to test by cross-examination the memory, honesty and means of knowledge of the witness, and at the same time allow the party using such affidavit to produce and rely upon it at the trial, without having first filed it in the cause, or given his adversary notice of its existence, that he might be enabled to explain it by the counter affidavit of the same party, or show its falsity by proof *aliunde*. Surely, no law-making power in this country ever contemplated such doctrine; or, if it did, it had no power for its institution, and to have declared it in plain terms would have been to transcend its authority and promulgate a nullity through the statute book; it being the peculiar theory of our institutions to arrive at truth in all matters of disputed or contested right by thorough investigation, each party being secured in the inalienable privilege of testing the proof for and against him, and of unveiling the falsehood that may be attempted to be practiced upon him.

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The law limiting executors and administrators under ordinary circumstances, to two years for the settlement of estates, and for that time and purpose allowing them to retain the effects of decedents, the idea then controlling the Legislature was, that it was but simple justice that at the end of that period the persons eventually entitled to the residue of estates after the payment of debts, should, instead of the representative, have the use and profits of such remaining estate, upon executing the refunding bond directed by section 2316. The law contemplates the use, and not the absolute ownership of the fund by the legatee or distributee; such use to ripen into absolute ownership, by the final settlement of the estate without the aid of the fund, or by the lapse of such time as will bar creditors from enforcing demands against the representative.

This view of the law and the purpose of the Legislature, if it needs strength, finds it in sections 2295 and 2311 of the Code. The first provides: "After the lapse of two years from the qualification of every executor or administrator, the Clerk of the County Court shall take and state his accounts, and once every year thereafter till the administration is closed." The last enacts: "No executor or administrator shall take, hold or retain in his hands, more of the estate of the deceased than amounts to his necessary charges and disbursements, and such debts as he shall legally pay within two years after administration granted, but all such estate so remaining, shall, immediately after the expiration of two years, be divided and paid over to the person or persons to whom the same may be due by law, or by the will of the deceased."

By section 2295, we have the express order of law

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for the taking and stating of the accounts of the executor or administrator immediately upon the expiration of the two years; and by 2311 the direct enactment for the payment, immediately, of the remaining estate to the persons entitled; the language of all these several sections being capable, by no construction, of giving to the County Court any other jurisdiction than that we have indicated, to be exercised in a summary way. The word, "summarily," used in the statute, should be construed in the same sense in which it is used in motions against Sheriffs, Clerks, etc., when the balances are readily ascertained from the record or execution.

The requirement of refunding bonds in all cases, was suggested by the fact that estates are frequently not wound up by executors or administrators for years after the expiration of the two years, because of the pending of suits. The mention of the Circuit and Chancery Courts in the same sections can not affect the question, as the Chancery Court has jurisdiction, independent of the statute. This construction harmonizes the jurisdiction of the different courts. It was intended to simplify the remedy in cases, the justice of which was beyond controversy, and that the Circuit and County Courts should have jurisdiction in cases where there is no litigation, to direct a simple payment. From the nature of its organization, and its general and inherent jurisdiction, always exercised by a court of chancery, it is manifest the Legislature did not intend that cases of complication and difficulty or dispute in the settlement of estates should be determined elsewhere than in that forum expressly created and qualified for that purpose.

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The case before us exemplifies and amplifies the bad policy of a liberal or enlarging construction of statutes giving jurisdiction to County Courts in matters of complication. Here we have two petitions and three petitioners, each claiming a specific legacy; one that she is entitled to two notes of two hundred and fifty dollars each. The executor answers that she is not entitled to the notes, but merely to the proceeds, or so much thereof as he can collect. That this is the meaning of the will, which is right, or whether either is, we are unable to say, the will not being part of the record before us. To the second he says, I must have credits on your legacy of one hundred dollars; and to the third, who comes into court on his separate petition, but asks to be, and is, made party to the first, and who says he was paid his legacy of one hundred dollars in Confederate money when he was a minor, and therefore is not bound by it; the executor says he denies the minority, and that petitioner's brother signed a paper as his security that he would be bound by the payment, and he asks to have these matters inquired into. Orders of reference to the Clerk for accounts are had, but by some means unexplained, the two first petitioners, and their claims are lost sight of, and we have before us only the party who is contesting his age and the Confederate money payment with the executor.

The proceedings as to the petitioner before this court are dismissed, he paying his costs, and the executor those of his answer and proof.

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FREEMAN, J., delivered the dissenting opinions of himself and NICHOLSON, C. J.

A petition was filed in the County Court of Wilson County, by Joseph C. Bowers and Wife *et als.* against P. S. Lester and H. D. Lester, which charges that Eli E. Eason died in 1860; that he left a will which was duly proven; that P. S. Lester was named executor, and at June Term, qualified as such, with H. D. Lester as one of his securities; that at July Term, 1860, he presented his account of sales, and effects that had come to his hands as executor, amounting to \$1,158.94, which was ordered to be recorded, as appears by record of this Court.

Petitioners then go on to state, that by the will of Eli E. Eason, deceased, the said Nancy D. Bowers, wife of Jos. C., was named as a legatee, and was to receive as her share of the estate, two notes on John W. Wrye, one for \$250, due January, 1860; and the other for a like sum due January, 1862; that both of these notes went into the hands of said Lester, but petitioners do not know what part of them has been collected; that said Lester had paid at different times to said Nancy, the sum of \$252; and the balance due her remains unpaid, though nearly six years have expired since the qualification of the executor. They further state, that by the said will, petitioner, Cassandra Eason, who sues by next friend, Jos. C. Bowers, was to receive \$100 as her share of the estate, yet Lester had refused to pay her anything.

That by said will, petitioner, Phœbe Ellen Bowers, was to receive a portion of the estate after the debts were

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paid; but how much is due her she can not actually state, though she knows she has received nothing.

They charge then, that the assets of the estate are more than sufficient to pay all the debts and charges against the estate, and that they believe and charge, that all the debts and charges, and claims against said estate, are long since paid, and none now remain against it and that said Lester, as Executor, is indebted to them in the sums which they claim as legatees under said will.

The premises considered, they pray that summons and copy issue against defendants, and that Lester be required to answer the petition on oath; and that judgment be rendered against the said P. S. Lester and H. D. Lester for any sum which may appear due them, and for such relief as will secure their rights, etc. This petition was regularly sworn to, and bond given for the prosecution of the case.

P. S. Lester filed an answer to this petition, in which he admitted all its material allegations, but insisted that he had not collected the money on the Wrye notes, but was proceeding to do so as rapidly as possible.

This part of the case need not be further noticed, as no complaint is made as to any matters arising on this petition.

After an account had been ordered by the Court between Lester and petitioners, W. P. Eason filed his petition, in which he recites the filing of the former petition, and its statements, and then goes on to charge that petitioner was entitled to a specific legacy bequeathed to him by said will, and also a distributive share of said estate after the payment of the debts and specific legacies; that

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the assets are more than sufficient to satisfy the specific legacies and other debts, etc.; that Lester had put in an answer to the first petition, in which he had stated that he had paid petitioner the sum of one hundred dollars. Petitioner calls on him to answer specifically when such payment was made, to file with the answer his receipt for the same, and state what kind of funds he paid the same in, whether it was the funds of the estate or not, and if so, from whom he had collected it.

He states further, that he was not of age until 1864, and had no regular guardian; and that defendant may have shuffled off on petitioner, when a minor, some of his Confederate money, etc. He prays that he may be made party complainant to the proceedings of Bowers and wife *et als.*, in the County Court, and that the Court give him a decree for his legacy of one hundred dollars, and for his distributive share. Process was prayed for, and general relief.

This petition was answered by Lester, who admits that petitioner was entitled, under the will, to \$100; but does not admit he is entitled to any thing else; and then goes on to claim that he had, in October, 1862, paid petitioner his \$100, took his receipt for it, and files it with his answer, and that the same was paid in Confederate money of his own.

Proof was taken which showed that petitioner was under twenty-one years of age at the time of the payment.

At March Term of the Court, 1867, the cause was heard as to W. P. Eason, when the Court decreed "that W. P. Eason is entitled to a specific legacy under the will of E. Eason, of \$100; that more than two years had elapsed

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since the appointment of Lester; that the assets of the estate are more than sufficient to pay the debts and specific legacies mentioned in the will; and that the \$100 specific legacy to petitioner had not been paid; it therefore adjudged and decreed that he recover said \$100 from said Lester and his security on his bond, etc., with interest amounting to \$36. From which decree of the Court the said Lester appealed to this Court.

The opinion of the majority of the Court holds, that the County Court had no jurisdiction over this case under sections 2312-13-14 of Code, pt. 2, tit. 3, c. 2, art. 17, entitled "Distribution of Estates." The language of the Code is, "any distributee or legatee of the estate may, *after* the expiration of two years from the grant of letters, apply to the County, Circuit, or Chancery Court of the county or district in which administration was taken out, to *compel* the payment of his distributive share or legacy." "The application shall be by bill or petition, shall set forth the claim of the applicant as legatee or distributee; shall allege that the assets are more than sufficient to pay the debts, charges and other claims, if any, entitled to priority, and be verified by affidavit."

"The proceedings under such application, shall be conducted as other equitable actions, and heard and determined summarily, as soon as practicable."

What is the jurisdiction here conferred, and what facts would have to be alleged to give the Court such jurisdiction? 1st, The party must be a *distributee* or legatee, and as such, entitled to a legacy or distributive share of an estate. 2nd, The proceedings can not be commenced until two years have expired, after grant of letters testa-

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mentary, or of administration. 3rd, The application must be made to the *County*, Circuit or Chancery Court of the county in which the administration was granted, and the application shall be made to *compel* the payment of the distributive share or legacy. See Code, 2312.

How shall the application be made? It shall be made "by bill or petition; shall set forth the claim of the applicant as legatee or distributee; shall allege that the assets of the estate are more than sufficient to pay the debts, charges and other claims, if any, entitled to priority, and be verified by affidavit." Code, 2313.

How shall the proceeding be conducted? They shall be conducted as other equitable actions, and be heard and determined summarily, as soon as practicable. Code, 2314.

Each one of the requirements is complied with in this petition. The executor had been in office six years; had failed to pay the legacy of \$100, as the petition alleges; the party claims to be entitled to it under the will of defendant's testator as legatee, not as heir, and the answer of defendant admits he was so entitled, but claims that the executor had paid it in October, 1862. If this is not a case under the statute, taking the allegations of the bill to be true, then I am unable to conceive of a case that would be.

If a demurrer had been filed for want of jurisdiction, such demurrer, admitting the facts of the petition, must necessarily have been overruled, unless we hold that where every fact is alleged in the petition that the statute requires, the County Court still cannot take jurisdiction. In other words, that the jurisdiction can not be sustained upon the express allegation of the facts required by the

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statute to be charged; but a different state of facts is to be alleged from what the statute requires, in order to exercise a statutory jurisdiction. This certainly can not be maintained. Yet here is a petition, alleging all the statute requires to give jurisdiction, dismissed for want of jurisdiction.

I may remark here that the same jurisdiction is conferred on the *County* Court, the Circuit Court, and the Chancery Court, by these sections. If a petition or bill had been filed in the Chancery Court, with the allegations contained in this petition, would it not be held that the Chancery Court had jurisdiction of the case, under the statute? If so, then, by the same statute, it is in equally clear and unequivocal terms conferred on the County Court; and I do not feel at liberty to say that the Court shall not exercise the jurisdiction conferred, however unwise I may think it was to give equity powers to a tribunal constituted as the County Court is.

It is held, in the opinion of the majority of this Court, that sections 2315 and 2316 of the Code have to be construed in connection with the above sections, giving the jurisdiction to the County Court. Section 2315 simply provides that "an affidavit before a Commissioner of Tennessee, or Consul, or Notary Public, as to the pedigree or heirship of any person, may be received as evidence thereof by any executor, administrator, or other person or tribunal having the partition and distribution of property or estates." I can see no possible bearing this section can have on the question of jurisdiction of the County Court. If it has any, it equally bears on that of the Circuit Court or Chancery Court. Besides, it only provides for the estab-

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lishing of heirship or pedigree. Such fact has always been proveable by hearsay testimony of what parties not under oath had said; such statements proven, it is true, to have been made by evidence of witnesses sworn. I cannot see that it is beyond the power of the Legislature to permit it to be shown by a sworn statement. The Code does not say it shall be conclusive, but may be received as evidence. If the fact was not so, then it could be the more easily met by contrary proof. But how can this provision for proving pedigree affect the jurisdiction of the Court in case of a legacy of specific amount, as this is? I confess I am unable to perceive it.

The next provision is for giving what has been known in our law as a refunding bond, since the Act of 1789, c. 23, ss. 2 and 3. It is but a re-enactment, substantially, of that statute, and simply provides, in substance, that a legatee or distributee, before receiving his portion of the estate, shall give a bond, conditioned "that if any debts truly owing shall be afterwards recovered against or otherwise duly appear, said legatee or distributee shall refund and pay his ratable share of such debts out of the share so allotted him." This certainly, to my mind, has no bearing on the jurisdiction of the County Court. That court, as well as any other, can direct such a bond to be taken.

It is said, however, that the intention was merely to confer on the County Court jurisdiction to ascertain from its records, returns and settlements of administration, the condition of the personal estate from which the legacy was due, and to do this by a simple calculation, strike the balance, and see what was due. This may be evidence on

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which the Court might act, and decide, in some cases, that a distributive share was due, but it is not what is required by the Code to give the Court jurisdiction. In fact, in many cases such striking of the balance would not show the distributive share to be due, under the sections of the Code referred to, for there might remain outstanding debts against the estate, which the assets would not meet and pay. Certainly it could not show that a specific legacy was or was not due in many cases, if any. Formerly such legacy might have been a negro, or now may be a horse, or other personal property, and the administrator's settlement, at the end of two years, would not necessarily show that this property would or would not be necessary to pay debts.

As to the County Court having no jurisdiction to construe wills, try questions of set-off, pass on complicated accounts between the administrator and distributees, etc., suffice it to say, no construction of the will is sought in this case, nor any question of the kind raised, except what must be adjudged and would be raised in any case where a legacy is sought to be recovered; that is, it must be ascertained whether the party is entitled to it under the provisions of the will, unless it shall be maintained that he is to have a decree for it, regardless of his right to it, or shall only be entitled to it under this statute, when the executor admits his right, and not otherwise.

Neither is there any question of set-off presented in this case, nor any complicated account to be taken. The claim in dispute, and the sole matter before us on this appeal, is a single item of \$100; and so far from involving any complication or construction of the will, it is admitted in de-

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fendant's answer that such a legacy is given in the will to the petitioner; and the only question to be tried by the Court was, is the petitioner entitled to a decree for its payment; or, in the language of the Code, shall the personal representative be compelled to pay it? If there can be an account of less complication than one containing only a single item, I am unable to conceive how it can be.

Again, it is said, it was not intended that the executor should answer the petition for the purpose of litigating the question involved. I answer, then why allow him to answer at all? Is the proceeding by bill or petition "to compel the payment of a distributive share or legacy," one that was to be all on one side, that is, for the complainant, and the defendant not to be heard to litigate the right claimed, nor show that he had performed the duty required of him by law? Surely this can not be the fair construction of this statute.

But again, the opinion holds, as I understand it, that the executor is not to answer and litigate the complainant's claim. I ask if such a proceeding would not be an anomaly in our law, to which no proceeding known will furnish the slightest analogy whereon to base such a construction. Admit, for the sake of argument, that this is, as assumed, a summary proceeding, or was intended to be by the statute, in any sense known to our law; yet I apprehend that in all such proceedings, the defendant may litigate the matter, and make his defense against plaintiff's claim; and the fact that such defense is made, has never been held to change the character of the proceeding, as a summary proceeding. The proceeding, however, is not

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called "a summary proceeding" in the statute, but it is provided it shall be a proceeding by "bill or petition," and the case thus made is to be tried as other equitable actions, and *heard* and *determined* summarily, as soon as practicable; that is, as I construe it, without unnecessary delay.

It is maintained in the opinion that the jurisdiction is not sufficiently defined, and no provision made for the enforcement of the decree, if the liability of the defendant is ascertained. It is an inherent power of every Court, to enforce its jurisdiction by the ordinary process known to the law. This is an axiom: *Deaderick v. Smith*, 6 Hum., 138; *Planters' Bank v. Fowlkes*, 4 Sneed, 461; 5 Sneed, 380. As to provision for return of process, and what term returnable to, I find no difficulty. The Act must be construed with reference to the well known organization of our County Courts. By the Code, 4180, the County Court is divided into a Quarterly and a Quorum Court. The latter meets every month; the other quarterly. All business required to be done by more than three Justices, is to be done at Quarterly Sessions. This jurisdiction, then, is not required to be exercised by more than three Justices; therefore, may be done by the quorum court. This meets on the first Monday in each month, and the petition is to be presented to this Court. As to the objection that the mode of proceeding is not pointed out, it was unnecessary to be done further than is done. First, it is provided that the proceedings under this section are to be conducted as other equitable actions. Second, section 4196 of Code provides: "The mode of proceeding in the County Court, where the jurisdiction is concur-

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rent either with the Circuit or Chancery Court, shall be as near as may be according to the rules and regulations laid down for the conduct of similar business in those Courts." This section is clear, and regulates the mode of proceeding.

Section 4204, page 758, provides that "the County Court is, moreover, in cases of concurrent jurisdiction, vested with all the incidental powers belonging to or conferred by law upon the Court with which its jurisdiction is concurrent, for the purpose of effectuating such jurisdiction." The Court having jurisdiction to hear and determine the case, may issue all process that the Chancery Court can; may make its decree and issue execution, or any other process necessary to enforce its decrees; for the jurisdiction conferred is unquestionably concurrent with the Chancery Court, whatever that jurisdiction may be. Section 2998 of the Code provides that "all judgments and decrees of any of the judicial tribunals of this State for money, may be enforced by execution. Section 3006 provides for the issuance of execution by the Clerk of the County Court in ten or twenty days.

These sections provide the mode of proceeding in cases of concurrent jurisdiction, and the mode of enforcing any liability that may be ascertained by the Court. Perhaps it is proper to add, that the other sections of the Code referred to in the opinion, as being conclusive on the question—that is, those requiring the personal representative to settle at the end of two years, the statement of his account by the Clerk of the County Court, and the force and effect of such a settlement in favor of said personal representative, &c.,—have, as far as I can

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see, no bearing whatever on the question in this case. They simply define the duty of the administrator or executor to settle his accounts, and pay over shares of distributees and legatees, &c.; but how that, or all these provisions referred to, can possibly show that the County Court did not have jurisdiction of this petition to compel the payment of a legacy, I am unable to perceive.

For the reasons stated in this opinion, I am reluctantly compelled to dissent from the opinion of my brother Judges. I do not feel bound to *impose* any limitations on the jurisdiction of any inferior court, nor to enlarge the jurisdiction of any court. The Constitution and Legislature confer jurisdiction on the courts. I only feel bound to ascertain what it is, and enforce it. I may add, while this Court can revise the action of all inferior tribunals, we, at least, need feel no serious uneasiness as to the extension of the jurisdiction of such courts. We can safely leave that question where the Constitution and the Legislature have placed it.

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H. D. LESTER, Trustee, &c. v. ALLEN W. VICK *et als.*

1. EXECUTORS. *Bond of. Trusts of the will.* Under the Act of 1838, c. 111, s. 18, the sureties of an executor are liable for the performance of the trusts created by the will, whether such as relate to the office of executor, or continuing trusts relating to the preservation and management of the property for the benefit of devisees for life, and remainder-men.
2. SAME. *Will. Loan. Investment.* Where a will directs a trustee to keep a fund loaned out, there is no authority for investing it in real estate.

FROM WILSON.

Chancery Court at Lebanon, J. P. STEELE, Ch., presiding.

JORDAN STOKES and B. J. TARVER, for complainants. Mr. STOKES insisted that the character of trustee and executor were consistent, and may coëxist; in which it differs from the offices of executor and testamentary guardian, the latter of which succeeds or follows the former; that this will does not separate the capacities of trustee and executor. The words of the Act of 1838, c. 111, s. 18, embrace the case. If he took the fund as executor, he could not discharge his sureties from their liability by a subsequent holding as trustee: 2 Redf. on Wills, p. 64, § 13; *Hunter v. Bryson*, 5 Gill & Johns, 483. But there is no act to change the character of holding: Hill on Trust., pp. 237, 239, 364. He settles as executor 29th June, 1860, and 25th September, 1861, as executor and trustee. He loaned the fund, as executor, up to May 15, 1862, and left it so when he died.

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B. J. TARVER cited, on the accountability of trustees, *Carter v. Rolland*, 11 Hum., 333; *Draper v. Joiner*, 9 Hum., 614; Code, 2513; Story Eq., § 1272; 3 Lead. Cas. in Eq., 744, m.; 2 Wms. on Exr's, 1539 and n.; Hill on Trust., 558, top and n. He insisted that *Carroll v. Bosley*, 6 Yer., 222, did not apply, and cited *Ross v. Wharton*, 10 Yer., 192, as construing it. Change of character of holding, 9 Metc., 525; *Perkins v. Moore*, 16 Ala., 9. Insisted that the proof showed a continued holding as executor.

J. W. HEAD & SON, for defendants, insisted that a party would be regarded as holding, as he ought: *Harrison v. Ward*, 3 Dev., 417; *State v. Hearst*, 12 Mo., 365; *Lasley v. Lasley*, 1 Duval, 119; *Carroll v. Bosley*, 6 Yer., 222; *Drane v. Bayless*, 1 Hum., 174; 2 Hawks, 512; 19 Beav., 409. Probate of will; acceptance of trusts: Hill on Trust., 214. Code, 1974, does not affect the validity of acts of trustee, who does not give bond. Change of character of holding: Hill on Trust., m. 214, 215; *Knight v. Loomis*, 3 Me., 294; *Wheatley v. Badger*, 7 Barr, 467; 2 Barr, 325.

TURNEY, J., delivered the opinion of the Court.

The decree of the Chancellor is reversed.

Jemima Carr died in Wilson county in 1857, after having made a last will, in which occurs a provision in these words:

"I direct that my executor sell my two slaves, Amanda and Alexander, which he may do at private

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sale, in order to secure for them good masters. I prefer that they should select their masters, provided they select men that will buy them at a fair price. The proceeds of said slaves, and the money I have at interest, I give to Dabney Carr, in trust, for the use and benefit of my said daughter, (referring to Martha Johnson,) and her children, during the life of said daughter, Martha Johnson, above named.

“In the execution of this trust, he will give my said daughter one-half of the interest, annually, for her sole use, and use the other half in paying for the schooling and other necessary expenses of her children, during the natural life of said Martha Johnson; and at her death, the whole of said fund is to be equally divided between her children then living, unless some of said children should die during her life time, leaving children of their own. In that event, such child or children shall represent the parent in said division.”

Dabney Carr was appointed executor of the will, and qualified and gave bond at the October Term, 1857, of the County Court for Wilson County.

This bill is filed to have the administrator of the estate of Dabney Carr, and his securities upon his executor's bond, account for whatever of the estate of Jemima Carr came to his hands, or ought to have come to his hands, under the will.

It is insisted for the defendants, that Dabney had made his final settlement as executor, and had assumed to control the fund as trustee, and the loss by him or on his account, if any, occurred while he was acting as

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trustee, and after he had settled and ceased to act as executor; therefore, the securities upon the bond as executor are not liable for the *devastavit*.

Whether he was acting in the one capacity or the other, when he appropriated or misapplied the fund, can make no difference in this particular case, as section 18 of the Act of the 26th of January, 1838, which was, at the time of the execution of the bond, in force, provided: "That all executors hereafter qualified, and their securities, shall be liable upon their bonds for the performance of all the trusts of the will which they are required to perform, and all duties devolving upon them as executors, as well in relation to the real as personal estate; and, in like manner, administrators hereafter appointed, and their securities, shall be liable upon their bonds for the performance of all the trusts and duties of their respective offices, as well in relation to real as personal estates; and such bonds, when taken in the forms heretofore prescribed, shall bind such executors and administrators, as herein provided." Nicholson's Supplement, 181.

This statute is broad, comprehensive and explicit, leaving no place for the escape of the securities under the defense made in their answer and argument.¹

By the bill, we are asked to construe the will. The provision is so plain we can see no course for the trustee to pursue, other than to keep the money at interest, upon safe and prompt security, collect the interest annu-

¹See *Porter v. Moores*, February 25, 1871, *post* —.

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ally, and apply it as directed. There is no authority for its investment in real estate, as prayed for.

A report of the Clerk and Master shows the amount of money for which Dabney Carr and his sureties must account. A decree therefor will be entered here.

On the 25th of February, 1871, a petition for rehearing was refused in this cause, and reference made to *Porter v. Moores*, decided on that day.

A. S. ROGERS, Plaintiff in Error, v. WAMAN LEFTWICH.

1. **BANK OF TENNESSEE.** *New issue.* The payment and receipt of bills or notes of the Bank of Tennessee, issued after the 6th of May, 1861, in payment of debts, or in exchange for other notes of the same bank, issued before that date, were not illegal acts, nor could the party receiving the note regard the act of payment or exchange as a nullity, and sue for the debt, or the value of the notes given in exchange.¹
2. **QUESTION RESERVED.** The Court declines to express any opinion on the validity of such *new issue*.
3. **CONSTITUTIONAL LAW.** *Schedule of 1865. Retrospective clause.* The Schedule to the Constitution of 1865 declaring such new issue to be void, can not create, by relation, a right of action upon such a transaction perfected before its passage, and upon which no right of action accrued when the facts occurred.

FROM WHITE.

In the Circuit Court, W. W. GOODPASTURE, J., presiding.

¹ See *Story v. Dobson*, ante, 29.

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J. H. SAVAGE, for plaintiff in error, cited, on payments in bank notes: 8 Yer., 176; Chitty on Bills, 331; 2 Head, 609; Story on Agency, § 115. Return of: Ch. on Bills, 458, 463, 464 and n. If illegal, it was apparent on the face, and charged the plaintiff with notice: Brooms' Legal Maxims, 645, 657.

S. H. COLMS, for defendant, insisted that the new issue note was not illegal, but merely void. If illegal, that the suit was upon a valid consideration, the original debt and the bank notes given in change which were legal: Chitty on Contr., 26 to 31 and n., 9th Am. ed.; 2 Kent, 465 to 468, and notes.

NICHOLSON, C. J., delivered the opinion of the Court.

About the month of May, 1862, plaintiff in error transferred and delivered to defendant in error, a note or bill of \$500, issued by the Bank of Tennessee in October, 1861, and in consideration therefor, defendant in error transferred and delivered to plaintiff in error a promissory note for \$150, owing by plaintiff in error to defendant in error, and \$350 in small notes or bills of the Bank of Tennessee, issued prior to the 6th of May, 1861. On the 14th of December, 1865, defendant in error sued plaintiff in error, in *assumpsit*, for the value of the \$150 promissory note and the \$350 in small bank bills of the Bank of Tennessee, upon the ground that the \$500 bank bill was illegally issued, and was null and void, as enacted by the Schedule to the amended Constitution of 1865. The cause was tried by a jury of White County, and, under the charge of the Circuit Judge, a

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judgment was rendered against the plaintiff in error, from which he has appealed in error to this Court.

In his charge to the jury, the Circuit Judge said: "If you are satisfied from the proof, that in 1862 the defendant presented to Mr. Carrick, one of the firm of Waman Leftwich, a \$500 bill, issued by the Bank of Tennessee after the 6th day of May, 1861, and received from Carrick, for the firm, \$500 in bills upon the Bank of Tennessee, of smaller denomination, in exchange for said \$500 bill, which bills of a smaller denomination were issued by said bank before the 6th of May, 1861, and were genuine, and said money so received by defendant was the money and property of the firm of Waman Leftwich, under such a state of facts, the plaintiff is entitled to recover in this action the value of the smaller bills. If the \$500 bill, claimed to have been received by plaintiff from defendant, was issued by the bank after the 6th of May, 1861, it was issued without authority of law, was unconstitutional, unlawful and void, and of no value, and could not be received as a payment on any debt or contract; and if received in exchange for genuine bank bills, the party so receiving it may recover the value of the genuine bills so given in exchange."

It is not necessary, for the determination of this cause, that we should express any opinion as to the legality or illegality of the circulation of the Bank of Tennessee issued after the 6th of May, 1861. Upon the hypothesis assumed by the Circuit Judge, that this issue was illegal, unconstitutional and void, it does not follow, as a necessary consequence, that plaintiff below was entitled to recover the value of the bank bills given by him in ex-

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change for the \$500 bill. It was not controverted on the trial below, that the \$500 bill was genuine, and that it was issued by the bank and put into circulation, and that the bills of the bank issued after the 6th of May, 1861, circulated, and were regarded as equal in value to those issued before that date. The \$500 bill showed on its face that it was issued after the 6th of May, 1861. This fact was as patent to plaintiff as to defendant. There was no pretense in the proof or otherwise, that plaintiff in error passed the bill to defendant in error in aid of the rebellion, or for any illegal purpose, but in an ordinary business transaction.

Upon the authority of *Story v. Dobson*,¹ decided at the present term, and that of *Naff v. Crawford*,² decided at Knoxville, and the cases cited in the opinion, we hold that the Circuit Judge erred in charging that the \$500 bill could not be received in payment on any debt or contract, and when received in exchange for genuine bank bills, the party receiving it could recover their value. The proof shows that the bills issued after the 6th of May, 1861, circulated as freely, and had as much commercial value, as those issued before. The transaction was, in all respects, fair and legal on both sides, and no liability could be subsequently created by the act of the Legislature or the Convention declaring the issue illegal and void.

The judgment below will be reversed and the cause remanded for a new trial.

¹ *Ante*, 29.² 1 Heis., 111.

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JANE DEAN v. FLETCHER SNELLING.

1. PARTITION. *Jurisdiction of County Court.* The County Court has no jurisdiction of a case of partition where it is necessary as a preliminary to settle the title.
2. JURISDICTION. *Objection to Waiver.* The rule that the filing of an answer in the Chancery Court is a waiver of objections to the jurisdiction, to decree upon matters properly of legal cognizance, has no application to the jurisdiction of the County Court.
3. SAME. *Same. Partition.* An answer to a petition for partition in the County Court, does not waive an objection to the right of the Court to try and adjudge title; but the petition will be dismissed at the hearing.
4. SAME. *Partition, Title.* The Chancery Court seems to be an especially appropriate tribunal to determine questions of title preliminary or incident to partition.¹

Cases cited: *Young v. Shumate*, 3 Sneed, 371; *Bond v. Clay*, 2 Head, 379, 380; *Young v. Thompson*, 2 Cold., 599, 600; *Porter v. Woodard*, 4 Cold., 599, 5 Cold., 86; *Whillock v. Hale*, 10 Hum., 65; *Nicely v. Boyles*, 4 Hum., 178; *Bruton v. Rutland*, 3 Hum., 436; *Butler v. King*, 2 Hay., 122; *Trayner v. Brooks*, 4 Hay., 294, Coop. ed.

Code cited: 2949, 3266, 4201, 4204, 4205, 4321.

FROM BEDFORD.

County Court, before WM. GALBRAITH, Chm'n, and J. M. H. COLEMAN and JOHN WILHOITE, Esqrs., of the quorum.

J. A. WARDER, for petitioners, cited, *Boynston v. Hubbard*, 7 Mass., 111; *Davis v. Hayden*, 9 Mass., 514; 3d Washb. on Real Prop., 87, 89, 293, 302, 381, 382; *White v. Pullen*, 24 Pick, 324; *Fitzgerald v. Vestal*, 4 Sneed, 258; *Fitch v. Fitch*, 8 Pick., 480; *Stover v. Ellesheimer*, 46 Barb., 84; *Hunter v. Bryan*, 5 Hum., 47; *Shaw v. Galbraith*, 7

¹See Code, 3277, where the power is conferred.

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Penn., 111; *Terrett v. Taylor*, 9 Cranch, 53; *Adams v. Ross*, 1 Verm., —; *Blanchard v. Brooks*, 12 Pick., 67; Sto. Eq., 236; Hicks Ch. Pr., 36, 236; Code, 2949, 3266, 4321, 4337, 4338; *Carter v. Taylor*, 3 Head, 30; *Groves v. Groves*, 3 Sneed, 187; *Lowry v. Naff*, 4 Cold., 370; *Butler v. King*, 2 Yer., 115; *Bruton v. Rutland*, 3 Hum., 435; *Nicely v. Boyles*, 4 Hum., 177; *Almony v. Hicks*, 3 Head, 39.

H. L. DAVIDSON and ED. COOPER for defendants. Mr. Davidson cited, *Fitzgerald v. Vestal*, 4 Sneed, 258; 2 Sto. Eq., §§ 1050, 1055, on the sale of an expectancy. On the effect of warranty in a deed, he cited Rawle on Cov. of Title, 321, 322, 323, 330, 338, 342, 344, and cases cited, including *Robertson v. Gaines*, 2 Hum., 383; *Douglass v. Scott*, 5 Ohio, 198; *Brown v. McCormick*, 6 Watts, 64; 14 J. R., 193; 7 Cow., 253; 2 Smith's Lead. Cas., 624; 3 Pick., 52, 61; 12 Pick., 47; *Shaw v. Galbraith*, 7 Barr, 111; Washb. on Real Prop., 85; *Doe v. Prestwick*, 4 Maule & Selw., 178; 8 Hum., 551.

Mr. COOPER cited, 4 Sneed, 258; *Hunter v. Bryan*, 5 Hum., 47, 48; *Cromwell v. Winchester*, 2 Head, 389; 2 Washb. on Real Prop., 480, 490, 662, 673, 718, top p.; 1 Sto. Eq., Jur., §§ 152, 162.

NELSON, J., delivered the opinion of the Court.

Elizabeth Snelling, an idiot, departed this life, leaving as her heirs at law, one brother, a sister, the daughter of a deceased sister, and the children of a deceased brother, Lemuel; and this petition was filed in the County Court of Bedford, by the said children, and the heirs of Lemuel, against the proper parties, for a partition or sale of the

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tract of land therein described, of which the said Elizabeth was the owner at the time of her death.

Lemuel Snelling died previously to his sister Elizabeth, and it may be inferred that her brother John died subsequently. The defendants, who are the heirs of John, insist that complainants are not entitled to partition, because they say that Lemuel Snelling, the father of petitioners, conveyed his prospective interest in the land to their father, John Snelling, by a deed executed in the lifetime of Elizabeth Snelling, bearing date 28th November, 1846, and duly registered 2nd January, 1847, in the Register's Office of Bedford County; and because they say further, that the County Court of Bedford had no jurisdiction of the petition for partition. The case stands on petition and answer, from which it appears that Harriet Arnold, the daughter of the deceased sister of Elizabeth Snelling, whose name, together with that of her husband, James H. Arnold, was signed to said deed, of 28th November, 1846, filed a bill in the Chancery Court at Shelbyville, and caused the deed to be annulled, as to her, for want of a privy examination, and had one-fourth part of the land assigned to her as her share. No copy of said proceedings in the Chancery Court is exhibited; but it is not a little remarkable that all the questions between the tenants in common were not adjusted and full partition made between them in that suit.

Under section 3266 of the Code, the County, Circuit and Chancery Courts of this State have concurrent jurisdiction of partition cases, by bill or petition; and by section 4201, sub-section 5, it is provided that the County Courts shall have original jurisdiction of "the partition

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and distribution of the estates of decedents and, for these purposes, the power to sell the real and personal property belonging to such estates, if necessary to make the partition and distribution, or if manifestly for the interest of the parties." Section 2949 provides that "the rules of practice of the Chancery Court, as prescribed in chapter 3, of title 10, of this part of the Code, will apply to all cases in equity, or in the nature of equity, in all the judicial tribunals of this State, unless otherwise expressly provided." Section 4204 declares that "the County Court is, moreover, in case of concurrent jurisdiction, vested with all the incidental powers belonging to or conferred by law upon the Court with which its jurisdiction is concurrent, for the purpose of exercising and effectuating such jurisdiction." Section 4321 provides that "the filing of an answer is a waiver of objection to the jurisdiction of the Courts, and the cause shall not be dismissed, but heard and determined upon its merits, although the Court may be of opinion that the matters complained of are of legal cognizance."

The section last cited is embraced in pt. 3, chapter 2, title 10, of the Code, and is, of course, not referred to or embraced in the provisions of section 2949. It does not authorize a waiver of the jurisdiction of the County Court, but is confined to the Chancery Courts alone. Nor can the jurisdiction of the County Court be conferred by consent, or by the filing an answer, under section 4204; for that section refers alone to incidental provision and not to the express power conferring jurisdiction in Chancery by filing an answer. Before the adoption of the Code, it was held, in *Young v. Shumate*, 3 Sneed, 371, under the law

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then in force, that the jurisdiction of the County Court, "though of an equitable nature, is very limited in its extent; it is merely what the statute has expressly conferred, and nothing more;" and that after the making and completion of the sale, its jurisdiction was exhausted, and it had no power to relieve a purchaser against the payment of the consideration money, and that he must resort to a court of equity. After the enactment of the Code, as one great comprehensive statute, it was determined in *Bond v. Clay*, 3 Head, 379, 380, that the County Court has no jurisdiction to relieve the purchaser of land sold under its authority, on the ground of a defect of title; that sections 4204 and 4205 were not intended to confer any new and enlarged jurisdiction, and were merely declaratory of the law as it previously existed; and that "for obvious reasons, the jurisdiction is not to be extended upon doubtful implications." The cases of *Young v. Shumate*, and *Bond v. Clay*, were cited with approbation, and followed in *Young v. Thompson*, 2 Cold., 599, 600; *Porter v. Woodard*, 4 Cold., 599; the latter case being also reported in 5 Cold., 86; Shackelford, J., dissenting, but no dissenting opinion reported.

We are content to follow these cases, and hold that the County Court has jurisdiction in cases of partition and sale, but not to any greater extent than is specified in the cases cited. We are not, any more than our predecessors, disposed to extend the jurisdiction by construction, knowing as we do that great litigation has existed throughout the State in consequence of the hasty, imperfect and inartificial manner in which this jurisdiction has been exercised in the division, or sale, of large estates belonging

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to minors, married women, and others, in cases where the County Courts were without the assistance of counsel, or where counsel appeared on one side only. It is not to be expected that Courts whose members are, generally, without skill or training in a knowledge of the law, should be as capable of exercising jurisdiction correctly as the Chancery Courts, which are usually composed of persons familiar with legal science and learned in equity jurisprudence, although they are more capable, from their local knowledge, of deciding questions of county police. But, in a case like this, even the Chancery Courts could not grant relief without a waiver of jurisdiction, as it has long been the settled law of this State, that "on a petition, or bill, for the partition of lands between joint tenants, or tenants in common, a court of equity will not take jurisdiction of, and adjudicate upon, conflicting titles: See *Whillock v. Hale*, 10 Hum., 65; *Nicely v. Boyles*, 4 Hum., 178; *Bruton v. Rutland*, 3 Hum., 436; *Butler v. King*, 2 Hay., 122; *Trayner v. Brooks*, 2 Coop. (Hay. R.,) 427, foot p.

Here, there is a direct conflict of title. The complainants claim as heirs of Elizabeth Snelling through their father. The defendants claim that the father divested himself of title before his death, and produce his deed. The complainants urge in argument, that the deed did not pass the title, for the want of words inheritance. The defendants insist that, upon a true construction of the deed, those words may be supplied, and that the deed, at any rate, operates as an estoppel. The complainants, by their counsel, deny this, and maintain further, that the deed under which defendants claim, was executed before

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the death of Elizabeth Snelling, and is void as the sale of a mere possibility in real estate. And finally, the defendants earnestly maintain that a sale of such a possibility is valid. Numerous authorities are cited, on both sides, and a case more unfit for the exercise of County Court jurisdiction could scarcely be presented. But, for the cases we have referred to, we should say that the Chancery Court is, pre-eminently, an appropriate tribunal in which questions like these should be determined,¹ and that, upon a bill filed to remove a cloud from the title, the jurisdiction to decree partition would result as a necessary incident. Without, however, deciding that question, it is sufficient to announce that this Court has no other jurisdiction by the appeal than was vested in the County Court, and that, as it appears from the pleadings that the title is litigated, the bill shall be dismissed for want of jurisdiction, but without prejudice.

The decree of the County Court will be reversed for this reason, and the costs in both Courts be adjudged against complainants.

¹See Code, 3277, where this power is expressly conferred, in accordance with the views of the learned Judge.

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NATHAN JACKSON v. WM. COLLINS, Ex'r, and CHESLEY
WILLIAMS.

1. CONVENTIONAL INTEREST LAW. *Forfeitures under.* The Act of 1859-60, c. 41, declares that an effort to take more than six per cent. interest for a debt which did not originate for money actually loaned, is unlawful, and shall operate as a release of the debtor from the entire amount of such debt, &c. This act, when applied to a note given for principal and usurious interest, computed on a debt, the origin of which was loaned money, does not operate to forfeit the original debt, but only the debt so far as it originates in the usury. The fourth section of the act makes an over-charge of interest only a forfeiture of the excess of interest.¹

Case overruled: *Turner v. Odum*, 3 Cold., 455, 463.

2. CONFEDERATE NOTES. *Payment in. How valued.* A payment unlawfully made in Confederate money, used by the payee, will be allowed for at its marketable value at the time it was received.

FROM BEDFORD.

Appeal from the decree of the Chancery Court at Shelbyville, JOHN P. STEELE, Ch., presiding.

The bill in this case was filed to set aside a payment of the debts mentioned in the opinion, made in Confederate Treasury notes. Complainant alleged that he had loaned the intestate of Collins, money equal to gold and silver, and that he kept it until the presence of the Confederate army gave him the opportunity to force upon him Confederate currency, "then very plentiful, and of but little value." Complainant refused to take it, and the debtor procured an order, as follows:

¹ See *Scruggs v. Luster*, 1 Heis., 154.

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"CAMP NEAR CHAPEL HILL, Nov. 14, 1862.

"*Mr. Nathan Jackson:*

"SIR—It has been reported to me that you refuse to take Confederate money in payment of debts. I take this occasion to remind you of general orders on this subject, and of the penalties attached for refusing to take Confederate money. You must take this money or be arrested and taken to the headquarters of this department, to be dealt with as the authorities may see proper.

I am, sir, very respectfully,

"D. W. HOLMAN, Maj. Com'g."

The other facts appear in the opinion of the Court. The decree below was in favor of complainant for the money actually loaned, with interest. Defendant appealed.

J. R. SCUDDER and ED. COOPER, for complainant, cited *Scruggs v. Luster*, 1 Heis., 150, and insisted that the interest unlawfully included would alone be forfeited if the proof showed the facts, citing *Sinclair v. Peebles*, 5 Cold., 587. That the proof must be clear and satisfactory, courts being reluctant to enforce forfeitures: Story Eq. Jur., 1319; *Woods v. Rankin*, 2 Heis., 46.

E. H. EWING and H. L. DAVIDSON, for defendants. Mr. DAVIDSON insisted that the forfeiture was under the 2d section of the Act of 1860, and was total; citing *Odom v. Turner*, 3 Cold., 455; *Sinclair v. Peebles*, 5 Cold., 484.

Mr. EWING insisted that the surety was entitled to have the Confederate notes returned. If used, the payment was ratified; if not, should be returned: 2 Par-

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sons, Notes and B., 189, n. i. Confederate notes, of value *Naff v. Crawford*, 1 Heis., 111. The surety was entitled to notice of the facts: 2 Parsons, N. & B., 198. The note was void under conventional interest law, 2d section, not the 4th; *Turner v. Odom*, 3 Cold., 455; *Sinclair v. Peebles*, 5 Cold., 584. The surety is bound only on the note, and could not be held on the original consideration.

NELSON, J., delivered the opinion of the Court.

It is not, and can not be, seriously controverted in this case, that, on the 4th day of October, 1860, E. P. Winn, in his life time, and the defendant, Williams, executed their joint notes to the complainant, amounting in the aggregate to \$2,239.68; that it was expressed upon the face of said notes, that they were to bear interest at the rate of ten per centum per annum; that, on or about the 14th November, 1862, the complainant, contrary to his will, received Confederate "money," in payment of said notes, and surrendered them to Winn; and that the duress under which he acted was the military order set out in the bill, addressed to him by D. W. Holman, Major commanding the Confederate forces at Chapel Hill, in the vicinity of complainant, threatening him with arrest and being taken to the headquarters of the Department, if he refused to receive the money; that said order was procured by Wynn, and delivered, either by him or under his authority, to complainant.

The propositions principally discussed before us arise out of the evidence taken in connection with the following statement in the amended answer: "That, since the

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last term of this Court, they have discovered that said notes were given in renewal of prëexisting debts, owed by said Ebenezer P. Wynn to complainant, for money loaned at various times previous to the consolidation and renewal of the same, in the Summer or Fall of 1860; and when they were so renewed, there was included in the renewal notes interest at the rate of ten per cent. per annum, from the time of said several loans; and the renewal notes stipulated on their face for the payment, in future, of ten per cent. interest."

The Code, 1950, provides that a defendant sued for money may avoid the excess over legal interest, by a plea setting forth the amount of usury; but, as no question has been raised in the argument as to the want of a plea, or upon the vague and general statement in the answer, which contains no description of the notes renewed, or of the amount of usurious interest, and does not even rely upon the defense of usury by name, or offer to pay the amount actually due; we will proceed to consider the case upon the hypothesis that the defense is properly made.

The proof, as to the terms of the contract between complainant and E. P. Wynn, is not by any means clear and satisfactory. It is shown that complainant was, and for a number of years had been, to some extent, a money-lender. One witness borrowed \$1,000 from him in 1847, and paid him ten per cent. Another states that he borrowed money from him twice, at that rate, in twenty years, but does not state the amount, and is not able to say whether he borrowed any when it was lawful to loan at ten per cent. James C. Taylor testifies that

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he has borrowed money from him at different times, and always paid him ten per cent., except at one time, when he paid him six per cent. William Taylor says he borrowed money from him at different times within the last twelve or fifteen years, and always paid him ten per cent. He and James Taylor seem, finally, to have paid the complainant in Confederate money. J. F. Jackson, a son of complainant, deposes that before the war, his father generally charged ten per cent., but that his rate was not always uniform, and depended somewhat on the solvency of the parties—sometimes six per cent., but most generally ten per cent. William Simmons borrowed of him \$150, at ten per cent., two or three years before the war; and Isaac Hendricks, at some time not fixed, before the war, executed two notes at ten per cent.; but the two last witnesses, who were about to pay in Confederate money, were released of the interest or usury, on their not doing so. Thomas L. Hendricks proves that four judgments were confessed in favor of complainant on notes renewed at ten per cent., in 1860, but does not state whether any usurious interest was included in the notes.

On this evidence, the greater part of which was objected to when taken as inadmissible, it may be remarked that, if usury, in a particular transaction, can be proved by reputation, or by evidence of other transactions; the evidence shows that the custom or usage of the complainant was not uniform, and sheds no light upon the real nature of the transactions with E. P. Wynn. Nor is their nature clearly shown by the evidence of other witnesses. No witness was examined who was pres-

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ent when the notes were executed. Ely A. Seay, a blind man, states that he was present, on three occasions, when Wynn borrowed money of complainant, and thinks the notes in suit were executed after the Conventional Interest law was passed, and on what he styles "a re-borrowing;" but he details no particulars of the contract. James F. Jackson states that his father said there was \$1,000 due on one note, and \$1,200 on the other, when the notes were renewed, but he does not know whether ten per cent. interest was included. Thomas L. Hendricks heard the complainant say that Wynn got money at three or four different times, and renewed, "and put all in at ten per cent., and gave Chesley Williams for security, the amount due being over \$2,000.

The only other witness examined as to this question, was J. W. Wynn, a son of the borrower, who, prior to his examination, executed a release. He states that at Cole's sale, in the Fall of 1862, he heard his father apply to complainant for an extension of time until he could collect, during the Fall, the money for a lot of mules he had sold; that if he failed to make the collection, and complainant could "*wait on*," he would "renew the notes, and pay him ten per cent. on the money, just as he had done since the first time he had borrowed money from him." Mr. Jackson told him that he would wait on him, if he did not get the money, if he would renew the notes, with the same security that he had on the notes before, and on the same terms.

Without remarking upon the last mentioned conversation, which must have occurred not far from the date of the military order, and as to which it seems a little

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strange that the father of witness should desire the notes to be renewed, when Williams was already security to them, and when he must have known that he could not then lawfully charge ten per cent. on renewal, it may be said that the evidence is exceedingly defective, in not showing how much, if any, illegal interest was included in the former notes; or whether an additional sum was loaned upon their renewal; or whether ten per cent. was charged upon the previous aggregate of principal and interest, or upon the interest alone; or whether the expression that "he put all in at ten per cent., and gave Chesley Williams for security," meant simply that he had renewed the former notes at six per cent. or ten per cent., or that he had given a note for the interest then due, or that the new note merely, was to bear interest at the rate of ten per cent.

We would hesitate greatly to pronounce a decree upon such vague, unsatisfactory and inconclusive evidence, declaring, as it has been urged we should declare, a forfeiture of the entire debt. Nor are we satisfied that such a consequence would necessarily result from a proper construction of the Act of 1859-60, c. 41, which is alleged to have been repealed soon afterwards, at the extra session of 1861, and as to which a question is before us at Knoxville in reference to the validity of the repealing Act, not necessary to be now considered. As the statute has been quoted in former reported cases, and considered by us recently in two or three cases, we abstain from quoting its provisions at length, and simply announce our conclusions upon the questions discussed in this case, which are, briefly, as follows:

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1. The object of said statute was to relieve the people, by making it the interest of creditors not to sue, and also to induce capitalists to loan their money, or bring in money from other States and loan it, by increasing the rate of interest; and, under the first section, it was not required that any other part of the agreement should be stated upon the note than the contract to pay interest at the rate of ten per centum.

2. The proviso in the second section is, that: "It may be lawful to renew debts actually created for the loan of money at the rate of ten per cent. per annum, but nothing in this Act shall be so construed as to authorize any debt or liability, not *originating for money actually loaned*, thus to be renewed; and all efforts, by direct or indirect means, to take or receive a greater rate of interest than six per cent. per annum, for any debt, demand or liability, *the origin of which is not for money actually loaned*, shall be deemed unlawful, and shall operate as a release of the debtor from the entire amount of such debt, demand or liability." See Acts 1859-60, p. 32, c. 41, s. 2.

Construing this proviso in the second section in connection with the fourth section, we hold that it was lawful to renew notes, executed for borrowed money either before or after the time at which the statute went into operation, and to provide, upon the face of the new notes, that they should bear interest at the rate of ten per cent.

It was implied in the very idea of renewal, that if the notes were executed for borrowed money before the law took effect, the parties might treat the interest which had accrued at the time of renewal at the rate of six

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per cent., and include it in the new note, as so much of the principal, thereafter to bear interest at the rate of ten per cent. A debt or liability, *not originating for money actually loaned*, could not be renewed at ten per cent.; and any effort, directly or indirectly, so to renew it, operated as a release of the debtor, under the proviso of the second section, from the entire amount of the debt, demand or liability. But this forfeiture did not result where the note was for borrowed money.

3. Under the fourth section, the debt is not forfeited for taking, or contracting to receive, more than ten per cent. interest for the loan or use of the money. The contract is only made void as to the entire interest, where the contract is to take, directly or indirectly, more than ten per cent. for the loan or use of the money. The case of *Turner v. Odam*, 3 Cold., 455, 463, is not an authority against the construction here given. That case was determined in this Court, and it appears from the record that a petition for rehearing was presented at the same term, and the cause was re-heard at the succeeding term,¹ when a judgment was rendered directly the reverse of that announced in the opinion. We are not advised of the reasons which influenced this action of our predecessors, as we have been unable to find any written opinion giving a second construction to the statute. But we are satisfied that the conclusion stated in 3 Cold., 462, that the inclusion in the new note of the ten per cent. interest which had previously accrued on the note or notes for borrowed money, worked a forfeiture of the entire debt,

¹ See 4 Cold., xvi.

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was erroneous. The only forfeiture was the excess of illegal interest.

In this view, it was not unlawful for the complainant, who had loaned money to the defendant, to take new notes for the aggregate amount of principal and interest at six per cent., such new notes bearing interest at the rate of ten per cent. As his custom of lending money at usurious interest was not uniform, and he had security from Wynn, the presumption is, that he did not charge more than six per cent., and this is not overbalanced by the doubtful and uncertain evidence as to his conversations.

But, as it is in proof that the complainant sent the Confederate money to the South by one of his sons, and no effort was made to return it, let the defendants account for the amount of the notes surrendered by complainant, with ten per cent. interest thereon, up to the time the Confederate money was paid; and let the Confederate money be credited at its then marketable value, with interest at the rate of ten per cent. per annum on the residue, until the date of the decree.

The Chancellor's decree will be modified according to this opinion, and one-half of the costs, in this court and the court below, will be paid by the complainant. The other half of the costs shall be paid by the administrator of Wynn, out of any assets in his hands, but if there are none, it shall be paid by defendant, Williams, the security.

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ALEX. OFFICER *et al.* v. O. H. P. SIMS *et als.*

1. CONTRACT. *Unsigned by one party. Effect.* A covenant to pay money, the price of a negro, signed by the buyer, containing a stipulation to make a bill of sale at the time of the payment of the purchase money, evidently intended to bind the sellers, but not signed by them, is the covenant of the vendee only.
2. SAME. *Same.* If such covenant had been signed by both parties, it only bound the vendor to make the bill of sale when the money was paid; and so was not a dependant covenant.
3. SAME. *Dependant covenants.* If such covenant were dependant, an averment of readiness to perform at the day, the power then existing to make an effective bill of sale would be sufficient, though at a subsequent time, and before suit brought, property in slaves was destroyed by the amended Constitution.

FROM WHITE.

Circuit Court at Sparta, W. W. GOODPASTURE, J., presiding.

E. L. GARDENHIRE, for plaintiffs, cited: On dependant covenants: 7 Bac. Abr., 489; *Boon v. Eyre*, 8 T. R., 373; 1 H. Black, 273; 1 Chitty, 349. In reciprocal covenants, one not a bar to the other: 2 Mod. 309; 5 Co., 10; Cro. Jac. 645; 2 Lev., 41, 102; Show, 391; Comb., 265; 7 Bac. Abr., Title Pleadings, B; *Nichols v. Rainbred*, Hob. 88; *Ib.* 106; Yelv. 134; Mod. 62; Roll. R., 336; Ventr. 41; Hard., 102; March, 75; Cro. Eliz., 137, 703; Lev. 20, 293; Leon., 186. Construction: 2 Bac. Abr., 550, 576; *Ib.*, Covenant, F; *Marvin v. Stone*, 2 Cow., 781; *Pavy v. Birch*, 3 Miss., 447; *Randall v. Chesapeake and Delaware Canal Company*, 1 Harrington, 154; *Quackenboss v. Lan-*

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sing, 6 Johns., 49, *Watchman v. Crook*, 5 Gill. & Johns., 239; 2 Bos. & Pul., 13; 3 Ib., 565; 8 East, 80; 4 Dall., 440; *Hookes v. Swain*, Sid., 151; Keb., 511, S. C.; 2 Par. on Contr., 39, 41; *Kingston v. Preston*, 1 Ch. Pl., 311, 312. Where covenant goes to part of consideration: 2 Par. on Contr., p. 44, n. 45, and the first four authorities cited. Loss must fall on owner: *Curd v. Bonner*, 4 Cold., 633.

S. H. COLMS, for defendant, cited: Ch. on Contr., 9 Am. ed., m., pp. 635 to 638, and notes; Meigs R., 22; 2 Sneed, 22; 3 Hay., 258, 263; 4 Hum., 341, 342. Loss falls on owner: *Young v. Thompson*, 2 Cold., 603.

W. J. FARRISS, with Colms, insisted that the instrument need not be signed at the foot, citing: 1 Greenl. Ev., § 267 to 272, and notes; 3 Kent, 510; 4 Ib., 515; 2 Ib., 511; 26 Wend., 341; 18 Ves., 183; Chitty on Contr., 13, 356, 357, and note 2; 12 Johns., 102; Story on Pr. Notes, § 34. Kinds of Covenants: 1 Ch. on Pl., 321, 322, 324, 327, 329; 4 Hum., 468; 7 Yer., 565; *McFadgen v. Eisen-smidt*, 10 Hum., 567; *Parker v. Parmele*, 20 Johns., 130; *Smith v. Woodhouse*, 2 New York R., 233; *Miller v. Drake*, 1 Caines, 45; 2 Burr., 899; 8 East, 437; 13 East, 117; 2 Saund., 108; Story on Sales, p. 253; 7 Wend., 404; 1 Pars. on Contr., 148, 449; Chitty on Contr., 638; *Dodge v. Cod-dington*, 3 Johns., 146; *Cunningham v. Morrell*, 10 Johns., 203; *Green v. Reynolds*, 2 Johns., 207; *Jones v. Gardner*, 10 Johns., 266; *Stephenson v. Kleppinger*, 5 Watts, 420. Sale of personalty implies warranty of title: 5 Hum., 343, 496; on which trustee is personally liable: 6 Yer., 479. Plea of tender: Code, 2926; 3 Sneed, 524; 2 Eng. Law and Eq., 498; 2 M. & W., 228; Shep. Touch., 378; 2 Bro. &

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Bing., 165; 2 M. & S., 120. Construction of contract: Chitty on Contr., 5 Am. ed., 73, 76, 79, 80, 82, 83, 88. Property did not pass: Story on Sales, 274. Contended that *Potter v. Coward*, Meigs R., 22, and *Tatum v. Jameson*, 2 Hum., 298, did not apply. That 5 Yer., 282; 10 Yer., 507; 1 Hum., 466; 2 Hay., 66, 208, are cases under the registration law.

The entry setting aside the judgment of dismissal mentioned in the opinion, was a simple statement that "on motion" the order was "set aside, vacated, and for nothing held," without the usual recital that it was for "sufficient reasons appearing," &c.

SNEED, J., delivered the opinion of the Court.

The action is brought upon an instrument in the words and figures following:

"\$575.00. Twelve months after date, we promise to pay Alexander Officer and Luin Miller, executors of Nancy Officer, deceased, five hundred and seventy-five dollars, for value received, for a negro girl, Martha. But we hereby expressly reserve a lien on said slave for the purpose of securing the payment of the purchase money, at which time we agree to make a bill of sale to said purchasers. This 9th of January, 1862.

"O. H. P. SIMS, [SEAL.]

"WM. GLENN, [SEAL.]"

The instrument is signed only by the purchasers, who are the defendants in the cause.

The suit was instituted on the 22d of December, 1866;

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and the writ was returnable to the January Term, 1867, of the Circuit Court of White County. A declaration was filed at that Term, to which the defendants demurred, and the demurrer was sustained, with leave to file an amended declaration, which was done. To this amended declaration there was also a demurrer which was sustained, and the cause dismissed. On motion of the plaintiffs, this latter order was set aside, and leave granted the plaintiffs to file another amended declaration. At the May Term, 1867, the second amended declaration was filed. This declaration set out the instrument sued on, and concluded with these words: "And the said defendants then and there delivered said writing to the plaintiffs, but the said defendants, though often requested so to do, have not paid said sum of money, or any part thereof, to the plaintiffs, although plaintiffs aver that they were always ready, and are now ready and willing to make a bill of sale to the purchasers, according to the true intent and meaning of said writing. But defendants wholly failed and refused to pay the said sum of \$575; wherefore the plaintiffs say they have been damaged \$900, and therefore they sue." To this declaration there was also a demurrer, which was sustained; from which judgment the plaintiffs appealed.

The questions of law arise upon the causes of demurrer assigned, which are the following:

1. That plaintiffs aver that they have always been ready to make a bill of sale; but do not aver that they ever offered, or tendered, or proposed to make a bill of sale, or notified defendants that they wanted an execution of the contract.

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2. They also aver that they are now ready and willing to make the bill of sale, without averring any ability to do so.

3. They aver a readiness to make the bill of sale now, without tendering the same into court, which averment is therefore nugatory, and of no validity.

4. They aver that they are now ready to make the bill of sale, when the Court judicially knows that they can not make a bill of sale for any human being on this continent.

5. Nor do they aver that they tendered said bill of sale to the defendants, or offered to make it to them, before the commencement of this action.

6. And they demur generally, because it is not averred that they complied with, or offered to comply with, their part of the covenant, before bringing this action.

The issues upon the demurrer of defendants present several questions necessary to be considered in the adjudication of this cause, involving the construction of the instrument itself in reference to the character of its covenants—whether, upon the proper interpretation thereof, the declaration is demurrable, and whether, in view of the great public events by which the title to slave property was extinguished, the loss must fall upon the plaintiffs or the defendants.

The course of modern judicial opinion, in the interpretation of covenants, has been to resolve all other rules into one of intention. The artificial, and often subtle distinctions, upon the doctrine of mutual or concurrent covenants, or covenants with dependent or independent conditions, must all be subordinate at last to the rule of

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intention, the only infallible touchstone for the interpretation of contracts.

Does the instrument sued on embody concurrent covenants, which are to be performed at the same time, or dependent covenants, in which the obligation to perform one is made to depend upon the performance of the other? The defendants insist that they are mutual covenants, or dependent agreements—the one to pay, and the other to convey upon payment.

It is observed in a note to the case of *Pordage v. Cole*, 1 Saund., 320; Comyn on Con., 51, that “almost all the old cases, and many of the modern ones, on this subject, are decided upon distinctions so nice and technical, that it is very difficult, if not impracticable, to deduce from them any certain rule or principle, by which it can be ascertained what covenants are independent, and what dependent.” And it is stated, as a doctrine to which the courts have always adhered in the construction of covenants, that, “where the dependence or independence of the respective engagements is only to be collected from the evident sense and meaning of the parties, the rule is, that, however the covenants or promises may be transposed, their precedence must depend upon the order of time in which the intent of the transaction requires their performance.” Com. on Con., 51. And, again, it is said that they are to be construed to be dependent or independent, not according to their arrangement in the deed, but according to the intention and meaning of the parties, and the order in which the several things are to be done, and technical words should give way to such intention. 2 Bac. Ab., 614; 7 Term R., 130; 8 Term

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R., 366. The familiar example in the old authorities is, "if a day be appointed for the performance of the covenant on one part, and it is to happen, or may happen, before the covenant in the other part is to be performed, the covenants are not dependent. 2 H. Bl., 388; 1 East, 629; 2 Johns.; 272; 2 Bac. Abr., Bouv. Ed., 614.

This contract was for the sale and purchase of a slave, which, it is stated at the bar, was, at the time of the sale, delivered to the purchaser. There is one feature in the contract, which has been criticised at the bar, which might render it very doubtful, aside from all other questions, whether it contains any reciprocal covenant at all. The vendors of the slave have no where in the contract bound themselves to the performance of any of its covenants, by signing the same, or otherwise. This might become a serious question in a court of law, if an action were possible upon the alleged covenants of the plaintiffs. The intention to create reciprocal obligations is very manifest, and at the time this contract was made, such an intention, in a proper form of proceeding, might, perhaps have been enforced. But can the defense of dependent covenants avail in the court of law upon this instrument, when the plaintiffs have made no covenant at all? The words, "but we hereby expressly reserve a lien on said slave, for the purpose of securing the payment of the purchase money, at which time we will make a bill of sale," unquestionably show that it was the purpose of the parties, on both sides, to execute this instrument, and bind themselves by it, but the defendants only have done so. The case is presented to us, then, as a mere obligation, on the part of defendants, to pay a sum of money

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for a consideration which was then a good consideration, and which continued so to be until after the maturity of said obligation. It is very clear that there was to be no such thing as a mutual dependent covenant for the purposes of this defense, unless both sides have bound themselves in such a way that actions at law might be sustained respectively against them.

But waiving this question, the inquiry arises upon the construction of this instrument: Was the price of the slave to be paid first, before the conveyance or bill of sale was to be executed? If this be so, then the demurrer is not well taken; for the law would exact of the defendants the performance of their contract, or an offer to perform it, before a breach can be predicated as against the plaintiffs. It is very manifest that the payment of the price was the first thing to be done. The property was in the possession of the purchasers. It remained to them to pay the price, and then to demand the bill of sale. And it is clear that under this contract, accompanied by delivery, a payment of the price at the time it was due would have vested the title without the aid of a written conveyance. In this view, and according to the principles above stated, admitting this to be a reciprocal covenant, it is not a dependant covenant, as contemplated in the defendant's demurrer. The doctrine is not controverted, that, when an act is to be done by the plaintiff before the accruing of the defendant's liability under his contract, the plaintiff must aver in his declaration and prove, either his performance of such condition, or an offer or readiness to perform it, which the defendant rejected. This doctrine, we hold,

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has no application to this case, because there was no covenant on the part of the plaintiff to perform any act which was to precede the payment of this debt by the defendants: 2 Sneed, 562. If the plaintiffs covenanted to convey at all, they did so upon condition that defendants would pay the price. And if they failed to do so, it was on account of the default of defendants in not performing their precedent covenant to pay at the maturity of the note, when the plaintiffs had it in their power to make their own covenant effective. But conceding that the instrument does embody the dependant covenants, as insisted by the defendants, the declaration does aver a readiness on the part of the plaintiff to perform his part of the covenant at the time when said purchase money should have been paid, and when he could have made an effective bill of sale. And this we hold sufficient.

The ruling of the Court, upon the application of plaintiff to set aside the judgment of dismissal, and permit the filing of the second amended declaration, was the exercise of a sound discretion, which has ample authority in our statute of amendments: Code, 869.

The last, and perhaps the main question intended to be raised by the demurrer, is the effect of the destruction of all rights of property in slaves by the public events which followed soon after the maturity of the debt now sued on. In the view we have taken of the instrument in question, it is a simple obligation to pay money—a unilateral covenant to pay the price of a negro sold and delivered, absolutely and without condition. The Court will take judicial notice of the existence of

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the institution of slavery in this State on the 9th of January, 1862, when this purchase was made, and its existence on the 9th of January, 1863, when this debt was due, and of the utter extinguishment of that species of property by the Constitution of the 22d of February, 1865. This sale and delivery of the slave, with the instrument in question, the only evidence of the contract of the parties, completed the obligation of the purchaser in law to pay the price. The subsequent changes in the organic law, by which that species of property was destroyed, does not relieve the purchaser of the obligation to pay the price. It is well settled that in such case, the loss must fall upon him.

The judgment of the Circuit Court sustaining the demurrer, is reversed, and the cause remanded for trial upon its merits.

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W. S. SAYLOR and C. C. COLE v. JAS. STEWART'S HEIRS.

1. CHAMPERTY. *Adverse possession. Under decree.* A non-resident can not convey lands, adversely held for more than twelve months, under a Chancery decree vesting title.
2. SAME. *Ejectment. Joinder in. Vendor and vendee as parties. Pleading. Joinder.* A vendor in a deed void for champerty, may recover in ejectment, notwithstanding his deed; but if the vendee join with him, and the declaration contain a single count, the whole suit will fail.

Case modified: *Wilson v. Nance*, 11 Hum., 189.

FROM WHITE.

In the Circuit Court, W. W. GOODPASTURE, J., presiding.

W. S. Saylor and C. C. Cole v. James Stewart's Heirs.

S. H. COLMS, for plaintiff.

DEADERICK, J., delivered the opinion of the Court.

This action of ejectment was commenced in White County by plaintiffs, in April, 1861, against James Stewart. James Stewart died pending the suit, and it was revived against his heirs.

The land in controversy was granted in 1849, to C. C. Cole, one of the plaintiffs, and very soon thereafter he made a verbal sale of it to W. R. Cole, his brother, and put him in possession. W. R. Cole remained in possession until he was dispossessed by proceedings in chancery against him and Lucinda Cole.

In 1852, Stephen Cole, professing to act as attorney in fact for C. C. Cole, made a deed to the land to Lucinda. No power of attorney is on file, but the deed to Lucinda appears in the record, as does also a deed executed by Lucinda and Wm. R. to a third party, for ten acres of the land, dated in 1854.

In December, 1858, a bill was filed by one Grissam, against Lucinda Cole and W. R. Cole, to subject the land to sale, to pay a debt due him from W. R. Cole, alleging that the land was sold to and paid for by him, and that the title was taken to Lucinda to defraud his creditors.

Upon the final hearing, the land was ordered to be sold, for the satisfaction of Grissam's debt, it was purchased by Grissam, a writ of possession in his favor issued, and Stewart, by his direction, was put in possession under his purchase, 7th November, 1859, and W. R. Cole was then dispossessed. C. C. Cole conveyed by

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deed, to his co-plaintiff, Saylor, 17th January, 1861, more than twelve months after Stewart had taken possession, claiming under the purchase at the chancery sale.

Under these circumstances, it was insisted by defendant that W. R. Cole, for Lucinda Cole and himself, had held the possession of the tract of land, under his purchase and her deed of 1852, more than seven years adversely to plaintiff, and thus acquired title, which was by the chancery proceedings vested in Grissam, from whom Stewart held.

The facts disclosed in the record show that C. C. Cole's sale to Saylor was champertous, the land having been in the adverse possession of Stewart, at the time of said sale; and C. C. Cole, as well as Saylor, the purchaser from him, under the circumstances of this case, should be repelled from court. C. C. Cole being a non-resident, might have sold the lands, if it had been in the possession of an adverse holder without color of title.

The declaration contains but one count, in the names of C. C. Cole and Saylor, as joint plaintiffs. If the declaration had contained another count, in the name of C. C. Cole only, the action might have been maintained, on the authority of the case of *Wilson et al. v. Nance et al.*, 11 Hum., 189; it being held in that case, that, "when a deed is declared void for champerty, the title remains in the grantor." He may maintain an action of ejectment to recover the land, and a third party can not rely upon the void deed to defeat his recovery. But, seeking in a single count to recover in the joint names of the grantor and grantee, the champertous contract made by one of the parties, affects the interest of both, and is fatal to

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the whole suit. 3 Head, 502; 5 Hum., 593; *Ibid*, 379.

The Court left it to the jury to determine the questions of the statute of limitations, and of champerty, who rendered a verdict in favor of the defendants. We are satisfied with the verdict, and affirm the judgment.

STEPHEN TOUCHSTONE, Adm'r, v. DEBORAH TOUCHSTONE *et als.*

JUDICIAL SALE. *Purchase money. Collection before due. In Confederate or bank notes. Liability of Commissioner.* A Commissioner to sell land, receiving the amount of a sale note before it is due, deducting interest, in Confederate notes or bank notes, without an order of Court to do so, but by authority of the administrator, on whose application the land was sold to pay debts and for distribution, held liable only for what he received, if still in his hands, or if used by him, for its market value when received.

FROM LINCOLN.

Judgment in the County Court, on motion, against the Clerk, as Commissioner to sell lands, and appeal to this Court.

W. F. KERCHEVAL and J. V. G. CARRIGAN, for complainants.

JOHN M. BRIGHT, for Whittington and sureties.

J. P. DISMUKES, with him, cited the Code, 3610, and insisted that no motion lay; that Whittington sold as

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Clerk, and collected the money as agent of the administrator, and not as Commissioner, citing *Haynes v. Bridge*, 1 Cold., 32; *Fondrin v. Planters' Bank*, 7 Hum., 447. That notice was required, under the Code, 3583 to 3602, more than six months having elapsed from the time his liability accrued; that the judgment was bad, citing *Rucker v. Moore*, 1 Heis., 726; 5 Hum., 426; 3 Hum., 315; 3 Cold., 219.

NICHOLSON, C. J., delivered the opinion of the Court.

The original proceedings in this cause, in the County Court of Lincoln, resulted in a decree for the sale of a tract of land, of which Stephen Touchstone died seized. The objects of the sale were the payment of debts, and distribution of the residue among his distributees. D. J. Whittington was appointed as Clerk and Special Commissioner to sell the land. The sale was made on the 1st of February, 1862, when W. C. Sugg was the purchaser, who paid in cash \$509, and executed his three notes for \$1,528, payable at one, two and three years, with sureties. The notes were payable to D. J. Whittington, Clerk and Special Commissioner.

After the notes had all been paid and taken up by Sugg, the purchaser, a motion was made in the County Court for judgment against Sugg and his securities, for the amount of the first note, upon the ground that the note was paid off by Sugg in Confederate money. On this motion, judgment was rendered against Sugg and his sureties in the County Court, from which they appealed to the Supreme Court. At the December Term, 1866, the Supreme Court reversed the judgment, and dis-

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charged Sugg and his sureties from liability. In the decree the Court say: "The proof shows that the Clerk, as Special Commissioner, received payment of this note, though a part of the amount paid was Confederate Treasury notes. It was received voluntarily, and without coercion. The Commissioner had the right to receive payment, and it falls within the principles of executed contracts; and the Clerk and Commissioner having received it in payment, he is liable for the amount, all other questions being reserved. The judgment against Sugg and his securities is reversed, and the cause remanded to the County Court of Lincoln County for further proceedings."

The cause was accordingly remanded to the County Court of Lincoln County, when a motion was made by Stephen Touchstone, administrator, against D. J. Whittington and his securities as Special Commissioner, for the amount of the note, and interest. An issue was made up on this motion, and upon proof and report of the Clerk and Master, the County Court rendered a judgment against Whittington and his securities for \$955. From this judgment they have appealed to this Court.

Upon the trial of this cause in the County Court, two questions were mainly contested—first, whether the note was paid in Confederate Treasury notes; and, second, whether the Special Commissioner received the money of his own accord and upon his own responsibility, or at the request and upon the responsibility of the complainant, Stephen Touchstone who was the administrator and who had a right to control the fund for payment of debts and for distribution.

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The first question is not now one material to be considered. The proof shows that the note was dated February 1st, 1862, and was payable February 1st, 1863, bearing interest from date. The note was paid and taken up a few days after it was executed. The Commissioner had no right to receive the money and deduct the interest, whether it was paid in Confederate money or bank notes, and he would be responsible for the loss in either view.¹

But the Special Commissioner insists that he did not collect the note at all; that it was collected from Sugg, the payor thereof, by the administrator, through his attorney Stephens, and that it was deposited by said attorney with the Commissioner, to be drawn out and applied to the debts of the estate as they might be presented to the attorney for payment; and he states that a portion of the deposit was so drawn out and applied by the attorney of the administrator, and with his approval, and that the residue not so drawn out is still in his hands.

The depositions of Sugg, the purchaser of the land, and Stephens, the attorney of the complainant, were taken. Sugg proves that on the day of sale, and after the sale, Whittington came to him and asked him how much money he could pay. Witness replied, that he had the money ready to make the first payment, and if he could collect it he could pay that much. Whittington went off, and in a very short time Stephens came to him, and said that witness could pay any amount, or all of it, if he wanted to do so. Stephens said he was representing the admin-

¹See *Walker v. Walker*, 4 Cold., 310 Acc.

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istrator as his attorney. Witness told him he had the money, or could get it, and would meet him in Fayetteville any day, and pay the money. Witness met Stephens in Fayetteville, and agreed to pay off the first note, if he would deduct the interest at six per cent. for one year, and Stephens agreed to do it, whereupon witness paid the money to Stephens, and he gave witness up his note. Witness was not satisfied what sort of money he paid, but that it was current money, and such as they were willing to take.

Stephens proves that he was one of the attorneys who filed the bill for the sale of the land; that the administrator, (complainant, Stephen Touchstone, Jr.,) requested witness, when he left here, to act as his agent, and requested that if any money for the land was paid into court, to draw it out and apply it to the payment of the debts. Witness has no recollection of any conversation, about the time of the sale, about a cash payment; but he says that on the day of the sale Whittington came to him, and said Sugg wanted to pay the first payment on the land, if the interest could be deducted. Witness replied that he did not know whether the interest could be deducted or not; that the administrator had requested him to get the money and pay it out, and that the administrator had paid some out of his own pocket, and wanted to repay himself, as well as pay the debts. Witness soon afterwards met with Whittington and Sugg, when about the same conversation occurred. Witness proved, further, that he told Sugg and Whittington that he would apply to the County Court, for an order for

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Whittington to receive the money *minus* the interest; that he made the application for the order, which was refused. Soon after, witness, Sugg and Whittington had a conversation, when the result was, Whittington agreed to receive the money *minus* the interest, witness having said to Whittington there would be no difficulty about it, as the debts were drawing interest, and witness told Whittington he would draw the money from him as it was needed to pay the debts. Witness said, further, Sugg wanted to pay the money, Whittington seemed anxious to receive it, and witness was anxious to get it and pay the debts. Witness has no recollection of Sugg paying the money to him. Witness received a letter from the administrator before the sale, requesting him to draw out any money that might be paid in, and pay the debts. Witness mentioned to Whittington that the administrator was anxious to get money to pay the debts.

The only material discrepancy between these two witnesses is as to the person to whom Sugg paid the money. Sugg says positively that he paid it to Stephens, and took up his note from Stephens. On the contrary, Stephens says Sugg paid no money to him as agent of the administrator. If it were necessary to determine between these witnesses, as to the credit to which they are entitled, we should be inclined to hold that more credit is to be given to Sugg than to Stephens. Sugg's evidence is affirmative and positive; besides, he is entirely disinterested, this Court having discharged him from his liability. Stephens denies receiving the money as agent of the administrator. This is not a full and positive de-

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nial of having received it at all. Besides, Stephens was directly interested in making Whittington liable, otherwise he might be held responsible himself.

But, without relying specially on this proof, it is apparent that the money was paid by Sugg, with the full concurrence of Stephens, the attorney of the administrator. It does appear from Stephens' evidence that Whittington was anxious that the arrangement should be made for the payment of the money, but he also proves that he had informed Whittington that the administrator was anxious for the payment of the money. This information may account for the interest taken by Whittington, in effecting the arrangement between Sugg and Stephens. But, beyond all this, the administrator files his petition on oath for judgment against Whittington, and in this he denies that he instructed Whittington to receive Confederate money, or that his instructions had reference to any specific kind of money. But he does not deny that he had given his attorney directions to receive payment for the land; his denial is confined to the question whether his instructions limited his attorney to the receipt of any specific kind of currency. From which, together with the proof of Stephens, it is clear that Whittington was fully authorized by the administrator to receive payment of the first note in advance of its maturity.

The only question remaining, is, whether Whittington was authorized to receive in payment Confederate money, or anything but gold and silver.¹ It is fully proved by Sugg and Stephens, that Whittington received such money

¹See *Dillard v. Jarret*, Nashville, January 28, 1871; *Matthews v. Thompson*, January 25, 1871.

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in payment of the first note as was satisfactory to Stephens, the agent and attorney of the administrator, and that he received it with the full approbation of Stephens, if, in fact, he did not receive it from Stephens himself. It is further proved, that a portion of the money was drawn from Whittington by Stephens, and used in paying the debts of the estate, and that the administrator acquiesced in and ratified the acts of his agent and attorney in so doing. There is no evidence that the administrator objected to, or was dissatisfied with the conduct of Whittington, in receiving the Confederate money or bank notes, until several years after the same was received. From all which, the Court is satisfied that the Clerk and Special Commissioner received the money on the first note for the land, in pursuance of the instructions of the administrator given to his agent and attorney, and that the act of the Clerk and Commissioner, in receiving the Confederate money or bank notes, was sanctioned and approved at the time by the agent and attorney of the administrator, and was afterwards acquiesced in and ratified by him.

The Court is, therefore, of opinion that no liability rests upon the Clerk and Special Commissioner and his securities for improperly receiving the payment of the first note of Sugg. But that Whittington is bound to hand over to the administrator of Touchstone, so much of said first payment as he had not properly disbursed, and as remains in kind in his hands; and if the same does not remain in kind in his hands, he is liable to account for its marketable value at the time when received. And as it does not clearly appear in what currency the

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first note was paid, the same will be inquired into by the Clerk and Master, and reported upon, both as to the kind of currency received, and the marketable value at the time received. This inquiry and report will not be made, if it is made to appear that Whittington still has on hands the same currency received by him.

The decree below will be reversed, and modified as indicated, and the cause remanded, to be proceeded in as herein directed. The costs of this Court will be equally divided between complainants and defendants; the costs of the Court below will be adjudged by the Chancellor.

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1. RECORD. *Signing minutes.* The minutes of a Court, not signed, have no force.
2. JUDICIAL SALE. *Of personalty. For distribution. Confirmation.* Upon a sale of slaves, made for distribution of the proceeds to the distributees, under the orders of a County Court, the sale was not binding until confirmation. The title did not pass to the purchaser, and the property was not at the purchaser's risk.
3. SAME. *Delivery. Surety. How affected by act of principal.* If delivery is material to the risk, the election of the purchaser to take possession and assume the risk, could not fix the liability of his sureties for the price, unless they assented to his act.
4. SAME. *Possession. How construed.* Where one of three purchasers of slaves was administrator, and all were distributees, and they had possession of all the slaves after the sale, and the administrator took them South for preservation during the war, with the consent of another one of the purchasers, but it did not appear whether they held them as

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purchasers or as distributees, it was held that this did not bind them, as purchasers, to the loss of the property, or to the consequences of a conversion.

5. EMANCIPATION. *Time of.* Emancipation took place in February, 1865, by the Act of the State Government.

6. SLAVES. *Passed to distributee, not to administrator.* From the passage of the Act of 1827, c. 61, Code, 2246, it was held that the title to slaves vested in the distributees or legatees, and not in the administrator or executor, as it did before that Act.

Cases cited: 1 Sneed, 365; 2 Sneed, 468; 3 Head, 698; *Childers v. Hurt*, 2 Swan, 487.

Cases reviewed: *Shaw v. Smith*, 9 Yer., 97; *Potter v. Coward*, Meigs, 22; *Newman v. Sloan*, 5 Cold., 390; *Polk v. Pledge*, 5 Cold., 384.

FROM LINCOLN.

Writs of error to the Chancery Court at Fayetteville, to reverse a decree of JOHN P. STEELE, Ch.

A. S. MARKS, for complainants, cited *Brown v. Bibb*, 2 Cold., 439; *Elliot v. Holder*, 3 Head, 698; *Elliot v. Cochran*, 2 Sneed, 470; *Savage v. Hale*, 1 Sneed, 365, to show that slaves descended to the distributees. The holder must bear the loss of property: *Lee v. Cone*, 4 Cold., 395; *Curd v. Bonner*, Ib., 632; *Graves v. Keaton*, 3 Cold., 8; *Young v. Thompson*, 2 Cold., 596. Title does not pass by judicial sale before confirmation: *Graves v. Keaton*, 3 Cold., 8; *Young v. Thompson*, 2 Cold., 596; *Barton v. Trent*, 3 Head, 168; *Bond v. Clay*, 2 Head, 379; *Houston v. Aycock*, 5 Sneed, 411; *Jones v. Walkup*, 5 Sneed, 135; *McMinn v. Phipps*, 3 Sneed, 196; *Webster v. Hill*, 3 Sneed, 333; *Young v. Shumate*, 3 Sneed, 369; *Horn v. Denton*, 2 Sneed, 125; *Pearson v. Johnson*, 2 Sneed, 580; *Childress v. Hurt*, 2 Swan, 489; *Pickins v. Reed*, 1 Swan, 80; *Wheatly v. Harvey*, 1 Swan, 484; *Mor-*

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ton v. Sloan, 11 Hum., 278; *Mann v. McDonald*, 10 Hum., 275; *Owen v. Owen*, 5 Hum., 352; *Wood v. Morgan*, 4 Hum., 371; *Henderson v. Lowry*, 5 Yer., 240; *Lowry v. McDermott*, 5 Yer., 225. He commented on *Potter v. Coward*, Meigs, 26, and *Polk v. Pledge*, 5 Cold., 384.

JOHN M. BRIGHT, for the defendants, to show that title passed by delivery, at common law, cited Bl. Com. So as to slaves in N. C.: 2 Hay, 62, 63; 2 Dev., 326. So as to slaves in Tennessee: 2 Meigs' Dig.; *Cains v. Marley*, 2 Yer., 582; *Davis v. Mitchell*, 5 Yer., 282; *Williams v. Walton*, 8 Yer., 387; *Tatum v. Jamison*, 2 Hum., 298. So as to Sheriff's sales: *Shaw v. Smith*, 9 Yer., 100; and sales by administrators: *Potter v. Coward*, Meigs, 24; *Gupton v. McCauley*, 3 Hum., 468; and Chancery sales: *Curd v. Bonner*, 4 Cold., 641; *Newman v. Sloan*, 5 Cold., 390; *Polk v. Pledge*, 5 Cold., 384; *Graves v. Keaton*, 3 Cold., 11. On the liability of sureties, that all are principals as to payee: *Nichol v. White*, 4 Hay., 257, 259; 3 Cold., 305; 6 Yer., 418, 424. Relief of sureties: 2 Meigs' Dig., 983, 986. As to lien, he cited *Gambling v. Read*, Meigs, 281.

NICHOLSON, C. J., delivered the opinion of the Court.

In December, 1862, Lucy Johnson and others filed their bill in the County Court at Fayetteville, against the other heirs and distributees of Agnes Johnson, deceased, for the purpose of procuring the sale of a number of slaves, which had belonged to Agnes Johnson, deceased. The object of the sale was, that the proceeds might be partitioned amongst the distributees. A decree of sale was made, by which the Clerk and Master was ordered to sell the slaves on a credit of twelve months,

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taking notes, with security, for all the purchase money, except five per cent. on the amount, and retaining a lien for the purchase money. The slaves were sold, and John A. Johnson, C. M. Johnson and Moses Cruse, three of the distributees, purchased four of the slaves at the price of \$3,580, paying \$179 in cash, and giving their notes, with A. H. Eddy and S. S. Alexander as securities. The Clerk and Master made out a report of the sale, and returned it to the June Term, 1863, of the County Court,¹ but the minutes of that term of the Court were never signed by the Court, and hence the report of sale was never confirmed.

Some time after the sale, John A. Johnson, with the knowledge and consent of C. M. Johnson, took the slaves South, where they were kept until after the close of the war, when they were brought back to Tennessee. In the meantime, they had been emancipated by the act of the Government.

The bill in this cause was filed by the purchasers of the slaves, together with their securities, against the other distributees of Agnes Johnson, deceased, setting forth the foregoing facts, and alleging that as the sale was never confirmed by the Court, the purchasers got no title, and praying that the notes for the purchase money be delivered up and canceled.

The defendants answer, and admit most of the allegations in the bill, but insist that if complainants got no title to the slaves, yet they ought to be responsible, for the reason that they carried the slaves to the South, and thereby made themselves liable for a conversion. It is

¹An entry of confirmation was put on the minute book.—REP.

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neither stated in the answer, nor proven, that the slaves were delivered to complainants when they executed their notes for them; nor is it insisted in the answer that the title was vested in the purchasers by virtue of the sale by the Clerk and Master, but it is insisted that if the title did not pass, complainants are liable for a conversion of the slaves.

The only proof in the cause is found in the following agreed facts: "That John A. Johnson, with others, became the purchasers of the negroes mentioned in this cause, and that about the last of July, 1863, when Bragg's forces were leaving the State of Tennessee, and the Federals advancing, John A. Johnson, of his own will, and by the consent and advice of C. M. Johnson, one of the joint purchasers of said negroes, removed them from the State of Tennessee to the State of Alabama, and that in 1865, after the surrender and the close of the war, said negroes were brought back to Tennessee by said John A. Johnson." It was further agreed, that John A. Johnson was administrator of Agnes Johnson.

The question to be decided upon these facts, and upon the allegations in the bill, and the statements in the answer, is, upon whom does the loss of the slaves fall—upon the three distributees, who were purchasers at the Master's sale, or upon all the distributees?

It has been uniformly determined that the loss, in such a case as this, must fall upon those who were the owners of the property at the time the loss occurred. In this case, the loss occurred when negroes ceased to be property, by virtue of the act of the Government of the State in February, 1865. We are to inquire, there-

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fore, in whom was the legal title to the slaves in February, 1865?

It is well settled, that, since the Act of 1827, c. 61, and the Code, 2246, the title to slaves vested directly in the distributees of an intestate, or the legatees of a testator, and not in the administrator or executor, as it did prior to that Act. The personal representative, however, held the slaves, subject to be made liable for the debts of the intestate or testator, according to the provisions of that Act, and the Code. 1 Sneed, 365; 2 Sneed, 468; 3 Head, 698.

The proper proceedings were had, under the Act of 1827, and the Code, 2246, for the sale of the negroes of Agnes Johnson, deceased, for the purposes of distribution. When the sale took place, under these proceedings, the title to the slaves was in the distributees of Agnes Johnson, deceased, and the question is, was the title divested out of them, and vested in the purchasers, by operation of law, upon their bidding the negroes off, and executing their notes, with security, without anything more? Or did the title remain in the distributees until the bid of the purchasers should be accepted, and their notes for the purchase money approved by the Court, and the sale confirmed?

The decisions in our State have been uniform, that, as to the sale of lands by Clerks and Masters, the title remains in the original owners thereof until the sale is confirmed, and then the title is divested out of them, and is vested in the purchasers. *Childress v. Hurt*, 2 Swan, 487. It is difficult to see why the same rule should not prevail in the case of judicial sales of slaves, since the

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decisions construing the Act of 1827; yet it is well known that the cases to be found in our books, present, on this question, no such uniformity of adjudication.

In the case of *Shaw v. Smith*, 9 Yer., 97, it was held, in relation to rights acquired under a Sheriff's sale, "that the contract was complete so soon as the negroes were struck off to the plaintiff as the highest bidder. He thereby acquired from the Sheriff all the property in the negroes, which had existed in the defendant in the execution at the time of the levy, and in consideration thereof he was bound to pay the price he had bid." This case did not involve the question as to where the legal title to slaves was after the death of their owner. It was an execution levied upon slaves of a defendant who was living, and the only question was, whether the title passed when the hammer fell, without an actual delivery. It was properly held, that the contract was complete so soon as the slaves were bid off, and that the purchaser was responsible for the price bid.

In the case of *Potter v. Coward*, Meigs' Rep, 22, it was held that a sale of chattels was complete so soon as both parties have agreed to the terms. In that case, an administrator was ordered by the County Court to sell sundry negroes for cash in hand. Defendant was the highest bidder for four of the slaves. One, named Lewis, was bid off at \$680. The bidding was not completed till late in the evening, and about sundown the administrator said, in the hearing of the defendant, that it was then too late to proceed with the business, but that the purchasers must attend next morning, and finish or close it. None of the negroes bid off by defendant were proven to have

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been delivered to him on the day of sale, nor did he pay any of the purchase money on that day. The defendant assented to the administrator's proposition, to attend next morning and finish the business. During the night the slave, Lewis, died suddenly. Defendant attended next morning, paid for the other negroes, but refused to pay for Lewis, on account of his having died before payment and delivery. Upon these facts the Court held that it is not the delivery or tender of the property, nor the payment of the purchase money, which constitutes a sale. The sale is good and complete so soon as both parties have agreed to the terms. It being the contract of sale, then, which changes the right to the possession, it necessarily follows that the right to the possession is changed from the moment the contract is made, and that the loss after that period of time is the loss of the vendee. It was assumed in this cause, both in the argument of counsel and in the opinion of the Court, that the legal title to the slaves, after the death of the intestate, was in the administrator, and the County Court ordered him to sell them for cash, but nothing is said about his making report to the Court. But the opinion proceeds upon the ground that the administrator had the right to make the contract, and as soon as the contract was made, the title, and consequently the right of possession, passed to the purchaser; and hence the Court, in that case, refer to the case of *Shaw v. Smith*, 9 Yer., 97, as a conclusive authority.

It is manifest that the facts in neither of these cases raised the question as to where the legal title to slaves was after a sale on credit by the Master, who had taken

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the purchaser's notes, retaining a lien, and whose sale was to be reported to the Court for confirmation. Upon the assumption that in the one case the title was in the administrator, and in the other in the Sheriff, the correctness of the decisions can not be questioned.

In the case of *Newman v. Sloan*, 5 Cold., 390, the facts are stated so briefly, that it is difficult to see how the question is raised as to the risk of the slave between the sale of the Master and the confirmation thereof by the Court. It is said in that case by the Court: "We are aware of no case involving the sale of personal estate, in which it has been directly and authoritatively decided that the casualties which may befall the property, between the sale and confirmation, must be borne by the original owners, and not the purchaser. *Potter v. Coward*, Meigs' Rep., 22, is an authority directly to the contrary of this, and shows that this slave, after the Master's sale, was at the risk of Boyd, the purchaser." There is nothing in the report of this case which enables us to see for what purpose the negro was sold by the Master, or whether he was sold as the property of an intestate or testator for distribution, or for the payment of debts, or whether the title was in a living defendant, or in the distributees or legatees of an intestate or testator. We can not, therefore, see that the case is an authority, applicable to the cause before us, any more than the case of *Potter v. Coward*, on which it rests.

In the case of *Polk v. Pledge*, 5 Cold., 384, the facts were, in all respects, like those in the case before us, except that in *Polk v. Pledge*, it appears that the slaves were delivered to the purchaser when he executed his

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notes. In giving his opinion, Judge Milligan says: "The sale, it is true, is not complete until the report is confirmed, nor can the purchaser be compelled, before confirmation, to complete his purchase; and, *vice versa*, he can not compel its completion by a conveyance until after confirmation." *Childress v. Hurt*, 2 Swan, 487.

This statement of the law is fully sustained by the case of *Childress v. Hurt*, in which Judge McKinney says, in regard to sales by a Master: "The purchaser is not considered as entitled to the benefit of his purchase till the Master's report of the purchaser's bidding is absolutely confirmed by the Court. Until confirmation of the report, the contract is not regarded as complete or binding."

The legitimate and necessary conclusion, from the position laid down by Judge Milligan, and sustained by Judge McKinney, would seem to be, that, if the slaves were emancipated before the title to them became complete by confirmation thereof, the loss would fall on the original owners, in whom the title continued. But Judge Milligan avoids this necessary conclusion by stating that "the purchasers had complied with the terms of the sale by executing their notes, and elected at the date of the sale to receive the slaves purchased by them; and they have continued to hold and use them as their own, as we infer from the record, from the date of the sale, in 1861, until they were emancipated, in February, 1865. The risk was voluntarily assumed by them."

It may be conceded that the purchasers might make themselves liable for a conversion, by electing to take the negroes and hold them as their own, without waiting for

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the completion of their title by a confirmation by the Court; but the securities would clearly be released, unless it appeared that they had assented to the election made by the purchasers. But we can not concur in Judge Milligan's conclusion, that the title depended on the question of delivery or no delivery.

But, in the case under consideration, it does not appear that when the purchasers executed their notes, with security, the negroes were delivered to them, if this was a material question; nor that they elected to hold them as their own, and to take the risk of a confirmation of the sale by the Court; nor that their securities were cognizant of or sanctioned any such election by the purchasers. In this material respect, the case before us is distinguishable from the case of *Polk v. Pledge*, as well as the cases of *Potter v. Coward*, and *Newman v. Sloan*, on which Judge Milligan relies in his opinion in the first named case. It is similar, in all its material facts, with the case of *Graves v. Keaton*, 3 Cold., 8, in which Judge Hawkins held that "the pecuniary loss consequent upon the emancipation of slaves, by the amendment of the Constitution of the State, adopted on the 22nd of February, 1865, must be borne by those who were the owners of such slaves at the time of their emancipation. Until the sale is completed by the confirmation of the report of sale by the Court, the purchaser acquires no title to the property."

But it is insisted for defendants that, although the title to the slaves did not pass to the purchasers, yet that two of the complainants, John A. Johnson and C. M. Johnson, took the slaves South, kept them there until

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1865, and thereby made themselves liable for a conversion. The facts fail to sustain this position. It is in proof that John A. Johnson, one of the purchasers of the slaves, was the administrator of Agnes Johnson, deceased, and as such, would reasonably have possession of the slaves. It appears that when Bragg was falling back, and the Federals were advancing, in July, 1863, the administrator, with the consent of C. M. Johnson, who, as well as the administrator, was a distributee of Agnes Johnson, removed the slaves from Lincoln County into Alabama, but whether for the purpose of saving the property for the estate, or under a claim of ownership, does not appear from the proof. We can not assume that he was guilty of a conversion, but rather that he was discharging his duty as an administrator, or exercising his right as a tenant in common, in trying to save the property. It is scarcely necessary to add that if the administrator and C. M. Johnson were guilty of a conversion, the liability would attach only to them and not to Cruse, the other purchaser, nor to Eddey and Alexander, who are not shown to have concurred in or assented to the removal of the slaves.

But, as the proof fails to show a conversion, it is unnecessary to notice this point further.

Upon a view of the whole case, we are satisfied that the title to the slaves continued in the distributees of Agnes Johnson, deceased, after the sale by the Master; and as the sale was not confirmed by the Court before they were emancipated, the loss must fall upon the distributees, in whom was the ownership at the time of their emancipation; but as John A. Johnson, with the consent of C. M. Johnson, had possession of the slaves till their

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emancipation, they are responsible for reasonable hire therefor.

The decree of the Chancellor giving judgment against the purchasers will be reversed, and the decree discharging the securities will be affirmed. The costs will be paid by the complainants and defendants, in equal portions, and the cause will be remanded that an account of hire may be taken.

J. Q. DAVIDSON, Adm'r, in the matter of JOHN B. BATES' Estate.

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1. APPEAL. *From the County Court.* Where the jurisdiction of the County Court is not concurrent with that of the Circuit Court or Chancery Court, no appeal lies directly to the Supreme Court but by consent.
2. SAME. *Record. Consent.* The consent, in such case, must appear in the record.

Case approved: *Phillips v. Hoffman*, 5 Cold., 251.

FROM BEDFORD.

EDM. COOPER, for appellant.

H. L. DAVIDSON, for appellee.

FREEMAN, J., delivered the opinion of the Court.

This is an appeal from the County Court of Bedford county, from a decree of that Court, on exceptions to a report of settlement of J. Q. Davidson, a dministrator *de bonis non*, of the estate of J. B. Bates, deceased.

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We are compelled to dismiss this appeal for want of jurisdiction.

It is provided by sec. 2304 of the Code, that when an account has been finally settled by the County Court, either party may appeal from the judgment of the court to the Chancery or Circuit Court, &c.

Section 3148 provides that, "in all cases in which the jurisdiction of the County Court is concurrent with the Circuit or Chancery Courts, *or in which both parties consent*, the appeal lies direct to the Supreme Court."

This is not a case of concurrent jurisdiction in the County Court with the Circuit or Chancery Courts; consequently, the appeal lies direct to this Court, only where both parties shall consent to such appeal. We hold that such consent must appear in the record, as the only condition on which such appeal can be granted. No consent appears, and we are not at liberty to supply the defect by any presumption, or to exercise jurisdiction not conferred on us by law.

This question was decided as we now hold it, by our immediate predecessors, in the case of *Phillips, Adm'r, v. Hoffman*, 5 Cold., 252, and we approve that decision.

The appeal will be dismissed at the costs of appellants and their sureties for their appeal.

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JAMES MULLINS AND ROBERT CANNON v. JOHN C.
AIKEN AND WIFE AND JONES.

1. CHANCERY PLEADING. *Title deeds, when to be exhibited.* Where a bill, to be relieved of a sale, states specific objections to the title of the vendors, and does not call upon them to deraign title, but only to meet the specified objections, the answer will be sufficient if it meets the allegations in the bill without exhibiting the title deeds.
2. SAME. *General averment of want of title.* Under a general allegation, in a bill that the vendor had no valid title, the vendee may show any defect in the title, sufficient to enjoin the purchase money or rescind the sale.
3. RESCISSION OR ABATEMENT. *Failure of title to material part. What is.* If the title fail to a part of the land material as an inducement to the purchase, as twenty-five acres, in a tract of one hundred, on which was the only unfailing water on the premises, the vendor has his option to rescind the contract, or to take so much of the land as the vendor can make title to, with an abatement of the price as to that for which the title fails. / 58
4. ABATEMENT. *How estimated.* The abatement will be of the value of the land to which the title fails, estimated relatively to the other parts of the land, at the price agreed upon.
5. SALE. *What title purchaser must accept. Estoppel in pais.* An estoppel in pais, set up against a clear defect of title, is not a title which a purchaser will be compelled to accept.
6. SAME. *Same. Deed not authenticated.* A Court will not require a vendee to accept a deed not properly authenticated for registration; as if it be acknowledged, and the certificate fails to show that the Clerk was personally acquainted with the bargainor.
7. SAME. *Same. Attachment.* An attachment upon land sold, before registration of the debtor's deed, with a decree *pro confesso* against the former holder of the legal title, under whose title the vendor claims, is such a cloud upon the title as will entitle the vendee to rescind.
8. RECORD. *Paper made after decree.* A receipt by the Clerk and Master of the Court in which an attachment is pending, for the debt sued for, dated after an appeal is prayed and granted and bond given, in a different suit for rescission, can not be looked to in the Supreme Court, though copied into the record.
9. LOST RECORD. *Papers not filed.* Papers which have not been filed can

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not be supplied, under the Code, 3907, by proof that they were read at the hearing.¹

10. SAME. *Remanding cause to supply.* A cause can not be remanded to supply, as lost, papers which never were part of the record.²

Cases cited: *Boyer v. Porter*, 1 Tenn., 258; *Galloway v. Bradshaw*, 5 Sneed, 72; *Buchanan v. Alwell*, 8 Hum., 519; *Goss v. Singleton*, 2 Head, 79; *Cunningham v. Sharp*, 11 Hum., 116; *Seay v. Hughes*, 5 Sneed, 155; *Collins v. Smith*, 1 Head, 255; 7 Hum., 84; 1 Hum., 135; 5 Sneed, 692.

Code cited: 3907.

FROM BEDFORD.

Appeal from the decree of B. L. RIDLEY, Ch., at May Term, 1860, in Chancery at Shelbyville.

W. H. WISENER, SR., for complainants, cited 1 Tenn. R., 258; *Wood v. North*, 6 Hum.; 309, 3 Hay, 83; *Newsom v. McLin*, 5 Hay., 241; *Ib.*, 271, 9 Yer., 283; 5 Hum., 310; 2 Yer., 196; 10 Yer., 206; *Phillips v. Hollister*, 2 Cold., 269; 4 B. Monroe, 601-604; 2 Parsons on Contr., 786-789; *Merriwether v. Larman*, 3 Sneed, 448; *State v. Jefferson Turnp. Co.*, 3 Hum., 306; 1 Sto. Eq., § 193 n.; *Kennedy v. Woodfolk*, 3 Hayw., 195; 1 Head., 255; *Waite v. Dolby*, 8 Hum., 406; *Ib.*, 516; *Wood v. Mason*, 2 Cold., 251, *Reed, Ex parte*, 2 Sneed, 375; *Winchester v. Winchester*, 1 Head, 496; Act. of 1827, c. 54; *Davidson v. Bowden*, 5 Sneed, 129; *Fall v. Roper*, 3 Head., 485; *Bone v. Greenlee*, 1 Cold., 29; *Harrison v. Wade*, 3 Cold., 505; 2 Yerg., 294, 302, 337, 400; 9 Hum., 714; *Massengil v. Boyles*, 11 Hum., 112; *Ross v. Cobb*, 9 Yerg., 463; *Foster v. Grizzell*, 1 Cold., 530, 4 Cold., 315; *Walker*

¹See *Baker v. M. & A. of McMinnville*, ante, 117.

²See *Mynatt v. Hubbs*, 1 Heis., 323; *Nave v. Nave*, *Ib.*, 324.

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v. *Dunlop*, 5 Hay., 271, 276; *Brents v. Brown*, 3 Head., 560.

J. O. SHACKELFORD & J. P. HELMS, with him, cited *Anderson v. Walker*, M. & Y., 201; 2 Swan, 77; 3 Head., 603; 3 Sneed, 77; 5 Sneed, 155; 2 Cold., 269, 3 Yer., 178; 5 Hay., 271; 10 Yer., 206; *Napier v. Elam*, 6 Yer., 108; 6 Hum., 309; 5 Sneed, 70; 8 Hum., 518; 11 Hum., 116; 2 Cold., 251; *Reed v. Noe*, 9 Yer., 283, 3 Sneed, 287.

T. B. MURRAY, with them, cited *Young v. Butler*, 1 Head., 640.

A. S. COLYAR, on the same side, cited 2 Head, 221; 1 Head., 251; 6 Hum., 309; 8 Hum., 439; 2 Head., 69; 2 Yer., 394, 400.

JNO. P. STEELE, R. B. DAVIDSON and N. and ED. BAXTER for defendants.

Mr. STEELE cited *Bartlett v. Watson*, 3 Sneed, 287; *Carter v. Parrot*, 1 Tenn., 237; *Haggard v. Mayfield*, 5 Hay., 121; *Brittain v. Cowan*, 5 Hum., 315.

Mr. DAVIDSON cited *Staggs v. State*, 3 Hum., 372; *Davis v. Jones*, 3 Head., 603; *Clark v. Lary*, 3 Sneed, 77; *Ferrell v. Alder*, 2 Swan, 77; *Gresley's Eq. Ev.*, 158, 159; 5 Hum., 315; *Mynatt v. Hubbs*, 1 Heis., 323.

Mr. BAXTER cited M. and Y., 339; 2 Yer., 395; 3 Hum., 355; 1 Head., 491; 2 Head., 256, 576; 3 Head., 17, 518; 8 Hum., 439; 1 Sto. Eq. Jur., § 646; 5 Hum., 404; Code, 3915, 4305, 4307; 2 Danl. Ch. Pr., p. 1054; 2 Cold., 72, 472; 1 Hum., 265; 11

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Hum., 475; 5 Yer., 62; 5 Cold., 193; 8 Hum., 441; 6 Yer., 41; 1 Dan. Ch. Pr., 335; 2 Ib., 850, 856; 3 Head., 605.

FREEMAN, J., delivered the opinion of the Court.

The bill, and amended bill, were filed in this case, the first to enjoin defendants from collecting notes given for the purchase of one hundred acres of land, lying near the town of Shelbyville, Bedford County, "until they can show a good title to said land; or if this can not be done, that said contract be rescinded."

The bill alleges the purchase of the land 26th January, 1856, and that three notes of \$2,314.50 each, were given for the purchase money, payable in one, two and three years, from 9th of January, 1856, with complainant Cannon as surety.

The grounds for the relief sought in this bill are, that complainants had no title to 75 acres of the land, and the bill goes on to specify the defects in the title. This is, however, disposed of by the answer and exhibition of title to this part of the land; so that as to this part of the bill, the case need not be further noticed.

The bill, however, charges that as to the balance of the land, 25 acres, on which the improvements and only lasting water on the place were situated, the title was in one Nathan Ivey, and had never passed out of him by deed or bond, nor been barred by the statutes of limitation, this part of the tract having only been in actual adverse possession for about three years.

This bill was filed 29th December, 1857, and at February Term, 1858, on coming in of the answer, the Chancel-

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lor dissolved the injunction so far as to allow the defendants to proceed to judgment in the Circuit Court on the notes, but not to have execution till further order of the Court.

Complainants by leave of Court granted them, filed the amended bill in this case, 22nd August, 1859, in which they claim a rescission of the contract on the ground of fraud, charging that the sale was at "public outcry," that Jones, and Aiken and wife, were all present at the sale, and it was publicly announced at the sale to the crowd assembled, that the title to the land was good and unquestioned;" and relying on these statements, complainant Mullins had purchased the land.

Complainants then go on to show the falsity of these assertions as to the title, by alleging that the title to the 25 acres referred to in the original bill had been in one John G. Sims, who had died in Williamson County, Tennessee, leaving three minor children to whom the land descended; that when the oldest of these children became of age, upon an *ex parte* petition by him and the two minors, filed in the Chancery Court of Williamson County, this land, with other land lying in Bedford County, was ordered to be sold for partition, or because it was to the interest of petitioners to sell; that none of the land lay in Williamson County, nor did any of the parties live in Bedford County; and that Ivey either purchased at the sale, or from parties who had so purchased about one hundred and fifty acres of land, of which this 25 acres was a part.

They charge that there never was any adverse possession of this 25 acres of land, as against the heirs of John

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G. Sims, until 1854; that John G. Sims died in 1844, and the title was still in his heirs.

An answer on oath to this amended bill was waived.

Aiken and wife, and Jones, answered the original bill, and after setting out their title to the seventy-five acres, with an explanation of the difficulties suggested by complainants in the deraignment of the title, they say that as to the 25 acres they are informed and believe that it is probably true, that the naked legal title to said land is in Nathan Ivey, but insist that Mullins was fully informed of the fact when the trade was made. They then propose that they will produce the relinquishment of Ivey, or a decree of a Court of Chancery, divesting him of all title to the land, within a reasonable time, and before complainant is ready to comply with his part of the contract.

They admit that several years before, Ivey had sold the land to one Holland, but perhaps not in writing, but claim that Holland had paid him fully for the land; that Ivey had lived many years adjoining it and finally moved to Texas, all the time recognizing the land as Holland's; that he knew of Holland's selling it to Arnold, and that when Robert Mathis bought the land from Arnold, Ivey went with him on the land, and showed him the lines and corners, and advised him to buy it, and not only set up no claim, but told Mathis the title was good; and they insist that Ivey never intends to set up any title to the land; and that they believe Mullins was fully informed about it when he bought the land, or at any rate before he gave his notes for it.

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As to the allegations of the amended bill, defendants answer, admitting that the land was sold publicly; that it was announced that Jones had a mortgage on the land, and would join in the title bond, and then insisting that Mullins gave his notes for the purchase money with a full and fair explanation and understanding as to the title.

They deny that the title was in Sims' heirs, and claim that at the time of sale it was properly in them; and that since the sale to Mullins, it had been vested in him by regular deed, according to the terms of sale.

They admit the sale of the land under the petition in Williamson County, as charged, and say that the land once belonged to John G. Sims, Sr., and that he died, leaving three minor children his heirs, to-wit: Walter H., Boyd W., and John G. Sims, Jr.; that at the sale Walter H. Sims bought the 103 acres of land now in controversy, he being the oldest brother, the other two being minors; that John G. Sims, Jr., one of these heirs, died about the time stated in the amended bill, and it appears from another part of the record, intestate and without issue. They then claim that said Walter H. sold to Ivey, who took possession of the land, and Ivey had sold to Holland 40 acres of land, including the 25 acres, but they can not say whether by deed or other writing, but they know that no deed can be found on record.

They then state that since the filing of the original bill, Ivey had been written to in Texas, and had promptly made a deed for the land, which they will produce on the hearing. They then re-state substantially the matters of estoppel arising out of Ivey's conduct, and insist on the statute of limitations as vesting the title as against him.

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There are other matters arising on the facts of the case as shown in the proof, which will be referred to, but these are the most material statements in the pleadings on which the questions for decision are raised.

We examine first, the questions presented on the original bill.

It is insisted that defendants should have set out their title in their answer, and that it should be accompanied by copies of their title papers, and this not being done, they must take the consequences of their failure to comply with the law. For this proposition, the case of *Boyer v. Porter* is cited, 1st Tenn. R., Cooper's ed., 258. That case was correctly decided, but is a very different case from this. There the bill was filed by a purchaser to enjoin a judgment on a note given for purchase money for land. The bill alleged generally that the vendor had no title to the land sold, so that it was not in his power to make a title. The defendant answered generally, and stated that it was in his power to convey the land, without stating how, or producing any title papers.

The Court say the defendant has not shown us how he can make a title, though he has been particularly called upon to do it. The law is, that the title deeds, or copies, would be higher evidence than the defendant's oath (to his answer) in the general way in which he has sworn; the defendant ought to prove the affirmative as to his title, unless he had produced or referred to deeds of record;" as he did not do this, the judgment was enjoined, and the sale rescinded.

In the case now under consideration, the complainants have stated specifically the objections to the title of the

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vendors, and have not called on them to deraign their title, and they are only called on to meet by their answer, the allegations of the bill. They have given a full statement in their answer, in which they have attempted to show, that the title alleged to be in Ivey is not in him, but really in themselves. Under the general allegations of this bill, however, that the vendors had no valid title to the land, we think the complainants might well show any defect in the title, that will be sufficient ground on which to enjoin the judgment or rescind the contract.

We may add further on this point, that the answer of defendants was not excepted to, but accepted as sufficient by complainants.

The next question is, have defendants shown such a title to the 25 acres of land as a Court of Equity would compel a vendee to accept, or is the defect so made out that the Court, under well settled principles, should rescind the contract altogether.

In executory contracts, the rule is, that without alleging fraud, the mere failure of title to a part of the land purchased, which materially affects its value or constituted an inducement to the trade, gives the vendee the option to set aside and annul the whole contract, or to retain the part to which the title is good, and have a deduction from the consideration, to the extent of the value of the portion lost, in reference to the whole tract. *Galloway and Pillow v. Bradshaw*, 5 Sneed, 72; *Buchanan v. Alwell*, 8 Hum., 519.

There can be no question, that if the title fails to this 25 acres, or is not such a title as a Court of Equity would compel a vendee to accept, then it is a failure in a matter so material, as an inducement to the purchase, as would

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entitle the complainant to a rescission of his contract, or at his option, to an abatement of the price to the extent of the value of this 25 acres, in reference to the whole tract.

Upon the facts stated in the answer to the original bill, the complainants would clearly be entitled to a rescission of the contract on account of the title being in Ivey, nothing more appearing in the case.

It is attempted to meet this by setting up an estoppel *in pais*, as against Ivey's title, by the fact that he had recognized the title of his verbal vendee, and had encouraged purchasers under him to purchase the land, telling them the title was good, etc. While it is a well settled principle that in a Court of Equity, Ivey would not be permitted to assert his title as against parties thus misled by him, and possibly even in a court of law, yet we can not assent to the doctrine that an estoppel, dependent upon facts to be proved by witnesses who may die at any time, or whose memory may fail, or who may have removed out of the reach of the party needing them, when his title is to be maintained, is such a title as a Court of Equity would compel a vendee to accept under a contract for a good title.

In this country, where registration laws prevail, as a universal rule, the policy of our law, as well as sound principle, demands that titles to land should be preserved in a more stable form than an estoppel *in pais*, dependent on such a state of facts as is alleged in the answer of defendant to the original bill.

It is insisted, however, that the statute of limitations has cured the defect.

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Where a title to land is clearly shown to have been perfected under the 1st section of the Act of 1819, and the right of the claimants absolutely extinguished by operation of that act, it would be a good title and such a one as a vendee would be compelled to accept: *Goss v. Singleton*, 2 Head, 79. Not so, however, where the mere possessory right of the legal owner of the land is barred by operation of the *second* section of said Act: *Cunningham v. Sharp*, 11 Hum., 116; 2 Head, 79.

The proof shows, in this case, no such actual possession of the land, for the period necessary to form the bar of the statute and extinguish the title of Ivey, under a deed or assurance of title purporting to convey a fee simple under 1st section of the Act of 1819, as is required by the numerous decisions in our State on this subject.

But defendants say in their answer, that they will procure the title from Ivey within a reasonable time, before complainant is ready to comply with his part of the contract. It is well settled that, if a vendor can make a title before the final decree, the vendee will be compelled to accept it, fraud being out of the way. Has the party shown in this record, an after-acquired title from Ivey, such as the law requires? It must not be a doubtful title; it must be a valid, clear, legal title: *Collins v. Smith*, 1 Head, 255; *Sebring v. Mersereau*, 9 Cowan, 344.

Ivey made a deed to Aiken and wife, or what purports to be a deed, which is in the record, of date of 20th of March, 1858, which was, or appears to have been, acknowledged on that day before a Notary Public, in and for the county of Limestone, State of Texas.

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This deed is not such a deed as can give assurance of a good and valid legal title, for several reasons:

First. The specific description of the land is very indefinite and uncertain, so that it is very doubtful whether we could identify the land, as the land in controversy, from the description in the deed. The deed describes it, also, as the land sold to various parties by Holland and vendees, but does not refer to the deed of any one of them for a description of the land, nor even state that deeds were ever made.

Waiving this, however, and admitting that the land is sufficiently identified, which we do not positively decide, still the deed contains no warranty, either general or special, of the title. Its terms are: "I now, therefore, in consideration of the premises, do hereby convey and release, and quit claim to all of said 25 acres, to the said John C. Aiken, and wife, America Aiken, for the use and benefit of said America Aiken, as conveyed to her by the said James W. Wallace, to have and to hold forever." This is all of the deed.

This conveyance having been made after the Act of 1852, enacting that "the term heirs," or other words of inheritance, shall not be requisite to create or convey an estate in fee, and that every grant shall hereafter pass all the estate or interest of the grantor, would convey the fee simple of the estate, if the same were properly proven and authenticated before us.

But, on looking at the certificate of acknowledgment of said deed before a Notary Public, in the State of Texas, the certificate fails to certify that he is personally acquainted with the bargainor, as required by our law.

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This has always been held a fatal defect in such certificates: 7 Hum., 84; 1 Hum., 135; 5 Sneed, 692.

Such a probate is a nullity; so that this deed is before us in the record, without any legal authentication whatever.

There is another cloud upon the title to this land, as appears in this record, which would render the title doubtful. There appears an attachment bill, filed by Sarah J. Burdett v. Nathan Ivey, attaching this land, before the registration of the deed or noting of the same for registration by the Register, for a debt of about \$316.

There was an amended bill filed in this case by complainants, to which Aiken and wife, and Jones, were made parties. While in the record, so far as we can look at it, there appears no final decree in this attachment bill, there is an order *pro confesso*, regularly taken against Ivey; and the answer of Aiken and wife set up no equity which would prevent a recovery by complainant in that case against Ivey; so that, as far as we can see, the land is liable to be sold under that proceeding, and is, as far as appears in this record, subject to the lien of the attachment in that proceeding.

It is true, there appears among the papers in this case, what purports to be the receipt of Whitthorne, Clerk and Master, for the money paid in satisfaction and discharge of the claim of Sarah Burdett in the attachment bill. This receipt can not be looked to for any purpose, as it is simply a loose paper, with nothing upon it showing it to be a part of the record, and is dated November 16, 1860, while the appeal in this case was

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prayed and granted at May Term, 1860, and bond given, dated 25th June, 1860.

With such an encumbrance on the land, we can not say the title is clear and beyond dispute, or that it is not a questionable one, so doubtful, that it would not be a compliance with the contract of Aiken and wife, and Jones, the defendants, if conveyed to complainants. In the language of Judge McKinney, in *Cunningham v. Sharp*, 11 Hum., 118, "all the books concur in the principle that a purchaser will not be compelled to accept a doubtful title."

With this view of the law and facts of this case, we need not examine the questions raised on the amended bill, the allegations of fraud, nor the validity of the title alleged to be in the heirs of John G. Sims; or rather we do not deem it necessary to decide these questions, the matters discussed being conclusive of the case.

Another question of some importance is presented, which we deem it proper to decide.

It seems that a number of papers read on the trial of the case before the Chancellor, were not filed in that court, nor made part of the record at the time of hearing, or before. These papers not appearing in the record, as sent up to this Court at December Term of this Court, 1866, a *certiorari* was awarded to the Clerk and Master of the Chancery Court at Shelbyville, to send up a more perfect record, the object being to get certain deeds that seem to have been read, from the Register's books perhaps, or referred to by counsel in their briefs, on the hearing of the cause, at the May Term, 1860.

The papers not being on file, at the May Term 1867

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the defendants made a motion in the Chancery Court at Shelbyville, for leave to be allowed to file copies of a deed from Robert Mathis to James W. Wallace, dated 23d October, 1854; and of a deed from Robert Matthews to James Wallace for 157 acres of land, dated 27th February, 1856; and of a deed from James W. Wallace to America Aiken, the defendant, dated April, 1856; and of a deed from John C. Aiken and wife to James Mullins for 100 acres of land, as parts of the record in this case; and for leave to show by proof before the Court, that said deeds were read as evidence before the Chancellor, at the hearing of said cause, at May Term, 1860; and for an order of the Court, that the Clerk shall certify said copies as parts of the record in this cause, in answer to a *certiorari* awarded by the Supreme Court.

Upon this motion, proof was taken in the form of various depositions, which we need not examine, except to remark that it presents the usual defects in such proof—that is, a want of memory as to how the facts were precisely, on the part of honest witnesses, who are detailing their recollection of occurrences happening seven years before.

The then Chancellor, however, on the evidence submitted, and after argument of counsel, made a decree, in which he recites that he is satisfied, from the testimony of two witnesses on file, that, on the trial of this case, at the May Term, 1860, before the Hon. B. L. Ridley, the former Chancellor, the deeds referred to in the motion, “were read, (or the reading was waived by adverse counsel,) from the Register’s books of Bedford county; and he ordered and decreed, that said defendants be per-

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mitted to file copies of said deeds, with the records of this cause, in this the Chancery Court;" and then decreed that the Clerk and Master should certify copies of said deeds as parts of the record in this cause, in obedience to the *certiorari* awarded from the Supreme Court.

The decree then recites that, at the hearing of this motion, the reading of the statement of W. H. Wisener, Sr., was objected to by defendant's counsel, on the ground that he was interested, and therefore is incompetent, stating the ground of such incompetency; from which decree an appeal was prayed and granted, to this Court. No bond, however, seems to have been given for said appeal.

The Clerk and Master then made out a transcript of the proceedings on this motion, with depositions taken upon it, and, as he says, in obedience to an order of the Chancery Court, and certifies that the deeds referred to, as copied in the transcript, are true copies, &c., of the papers read before the Chancellor on the former hearing of the cause, at the May Term, 1860; and the other parts of the transcript he certifies to be a copy of proceedings had in the Chancery Court at Shelbyville, at May Term, 1867, and September Term, 1867, on trial of said motion.

Can we look at these proceedings, and recognize them as part of the record in this case?

The Code provides that any record or paper *filed* in an action, either at law or equity, if lost or mislaid unintentionally, or fraudulently made away with, may be supplied upon application, under the orders of the Court,

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by the best evidence the nature of the case will admit of: Code. 3907.

We can not see any authority in this provision for this proceeding. The motion was not made to supply a lost record, or one mislaid unintentionally, or fraudulently made away with. In fact, it is not assumed that the papers were ever on file, or made a part of the record in the Chancery Court at all.¹ The proof taken on the motion shows the fact to be, that they never were filed in said court. We can find no authority in the statute for manufacturing a record to be sent to this Court and thereby supplying defects found in transcripts sent here.

Rule 15, for the regulation of the practice in our Chancery Courts, found in the Code, p. 981, is, that all deeds, transcripts of records, or other written documents, intended to be offered as testimony on the hearing of a cause, by either party, *shall* be filed with the Clerk, before the cause shall be heard, and if filed during the term at which the cause is heard, notice thereof, at least one day, shall be given to the adverse counsel.

The parties having failed to file their papers, and thereby make them part of the record, must abide the result. We can see no authority given the Chancery Court to make a record, or have papers filed and made part of the record, after the hearing of the cause, that were not made part of the record before the hearing, as the law directs.

We deem the practice a dangerous one, such as we

¹ See *Baker v. Mayor and Aldermen of McMinville*, ante, 117.

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can not sanction, to allow parties by parol proof, years after the case is determined, to supply and add to the records of the courts of the country, and thus make up the proceedings of the court, not from the entries made at the time the proceedings occurred, but from the uncertain memory of witnesses.

This is not a case for remanding the cause to an inferior court to supply a lost record, as in *Seay v. Hughes*, 5 Sneed, 155, because it does not appear that any portion of the record has been lost. On the contrary, it appears distinctly, that the papers desired never were a part of the records of that court.

With the papers here referred to, out of the case, as we are bound to treat them, it can not be pretended that defendants have shown a title to the twenty-five acres of land, such as they contracted to make. If they were in the record, and could be considered by us, we might find more difficulty in the decision of this case.

With this view of the case, we are constrained to reverse the decree of the Chancellor, and rescind the contract for the sale of the land, perpetually enjoining the collection of the notes given for the purchase money; and remanding the same for account of rents, allowing Mullins for such permanent improvements as have enhanced the value of the land.

Defendants will pay the costs in this Court, and complainants the costs in the court below.

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1. PURCHASE MONEY. *Seeing to application of.* A purchaser from a trustee to sell land mortgaged for payment of debts, is not bound to see to the application of the purchase money.
2. TRUSTEE. *Receipt of money by. Not a release of mortgagor or surety.* The maker of a mortgage with a power of sale in a trustee, or a surety of such maker, is not released of the liability to the debt by the fact of a sale and receipt of the money by the trustee, the trustee having applied the money to the payment of other debts by consent of the maker.
3. SAME. *Liability of.* The trustee in such case, is liable to a surety upon one of the notes secured by the mortgage, for the amount misapplied, and properly applicable to that note.
4. CHANCERY PRACTICE. *Decree over. Against trustee for fund misapplied.* All the parties being before the Court on a bill filed by the surety of the maker, to enjoin a suit for the debt, be released from the debt, or to apply the money received by the trustee to the payment of the mortgage debt, a decree is proper in favor of the holder against the surety of the maker for the balance of the debt, with a decree over in favor of the surety, against the trustee for the amount misapplied.

Case cited: *Williams v. Otey*, 8 Hum., 568.

FROM FRANKLIN.

Appeal from the Chancery Court at Winchester, at February Term, 1868. The transcript does not show what Judge presided at the hearing of the cause.

A. S. COLYAR & A. S. MARKS, for complainant.

TURNEY, J., having been of counsel for defendants, did not sit in this case.

DEADERICK, J., delivered the opinion of the Court.

The complainant filed his bill in the Chancery Court at Winchester, on the 9th of August, 1860, against G.

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W. D. Harris, guardian, &c.; F. T. Estill, administrator of W. E. Venable, deceased, and Benj. Dechard.

The complainant, with David and P. S. Dechard, about the 5th of July, 1853, became the surety of defendant, Benj. Dechard, to defendant, G. W. D. Harris, guardian, &c., upon several notes, amounting in the aggregate to about the sum of eighteen thousand dollars. At the same time, Benj. Dechard, with the assent of his sureties given in writing upon the deed, executed a deed of trust for a valuable tract of land situate in Franklin county, to secure said notes. The land was conveyed to W. E. Venable, trustee; and the deed provided that, if the several notes therein secured should be paid by the 10th of April, 1855, then the conveyance should be void; but, if the notes should not be paid, then the trustee was empowered to sell the lands conveyed, and with the proceeds pay the expenses of executing the trust: "he shall pay and satisfy said notes, with interest thereon, computed to the 10th of April in every year; and the balance of the proceeds of said sale of lands, if any, shall be paid to said Dechard."

The trustee was empowered by said trust deed to sell the lands publicly or privately. The trust deed contains the further stipulation that, "every security to said notes assents to the provisions of this deed, and agrees that the provisions of this deed shall not operate in any way to release him from any of the obligations or liabilities of said suretyship."

The trustee also signed the deed, and undertook the exercise of the powers therein conferred upon him. The land was sold for more than enough to pay the debts

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due to Harris, and the greater portion of said debt was paid to him from time to time.

As appears from the answer of Harris, Estill, the administrator of Venable, had a settlement about the 1st of June, 1858, at which time Estill paid him one of the land notes for \$3,253.61, leaving a balance then due to Harris upon the note of the Dechards and complainant, of \$929.50; and this is the sum, with its interest, which Harris claims is still due to him, and for which he instituted suit in the Circuit Court of Franklin county, against complainant. And the bill in this case is filed to enjoin that suit at law, and alleges that "the Harris debt was fully paid by the receipt of the land notes;" and further alleges that Venable, the trustee, "seeing and understanding that the Harris debt was all paid to him," paid and applied about fifteen hundred dollars of the land notes upon a bank debt due from Dechard, the maker of the trust deed, which Venable the trustee, had in his hands, as an attorney, for collection.

The bill further charges that, even if the Harris debt was not paid, the payment of the bank debt in his hands for collection, as an attorney, was a misapplication of the trust fund, and made him responsible, and released complainant, and that Harris is now prosecuting said suit at law against complainant to recover a sum of money due from said Venable's estate.

The bill further alleges that, after Dechard had left the State, Harris and Venable's administrator made a settlement, and it appeared that there was upwards of \$900 still due to Harris. The complainant, in his bill,

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prays to be discharged from liability, and that Estill, administrator of Venable, be required to pay the debt to Harris.

Harris, Estill administrator of Venable, and Dechard, the principal in the notes and maker of the trust deed, answer.

Harris, in his answer, insists upon the liability of complainant for the balance due him, of \$929.50, 1st of June, 1858; and that he is not discharged from said liability by reason of the failure of Venable to pay the full amount of the debt due him; and that Estill, administrator, promised not to plead the statute of limitations if sued by him.

Benjamin Dechard, the principal in the notes secured, states that the trustee had in his hands a debt due to the Planter's Bank of Tennessee, and that he and the trustee made a calculation of the debt due to Harris, and made out about \$1,500 in the hands of the trustee, in land notes, over and above what would be required to satisfy the Harris notes; and the trustee claiming no commissions, he directed him to apply the \$1,500 to the payment of the bank debt and other notes in his hands for collection, which was done.

Respondent, Estill, states in his answer that he does not know how the notes for the land were disposed of, except the notes which came to his hands as administrator, which were received by said Harris as a payment, as stated in his answer. He says he can not admit or deny that his intestate took the notes in full payment of Harris' debt; but intestate told him that he applied a portion of the notes, (and about the amount

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stated,) as alleged in Dechard's answer; and further states that he would not plead any statute of limitations if sued by Harris, unless it was his duty, or he was compelled to do so.

On the 5th of October, 1866, Harris filed a cross bill, making the purchasers of the land from Venable, trustee, parties, and seeking to hold them liable, upon the ground that they were bound to see that the purchase money of the lands conveyed in the trust was applied to the extinguishment of the debts therein secured; insisting, however, that the liability of the purchasers of the land did not release Loughmiller from his obligation to pay the debts.

This cross bill was demurred to, and the demurrer was sustained, and the cross bill dismissed; and upon the original bill the Chancellor rendered a decree in favor of Harris, against complainant, Loughmiller, for \$929.50, and interest thereon, from 1st of June, 1858. Harris, the complainant in the cross bill, appeals from the decree dismissing his cross bill, and complainant, Loughmiller, also appeals from the decree against him.

The argument here has been chiefly directed to the question presented by the cross bill; and it is insisted that the purchasers of the land from the trustee were bound to see to the application of the purchase money to the debts secured in the trust deed. Several authorities are produced, sustaining this view; and the case of *Elliott v. Merryman*, Lead. Ca. Eq., p. 58, is specially relied on to support this proposition. It is unquestionably true that such is the current of English authorities; but a different rule has prevailed in most of the Ameri-

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can States. And whether the property sold be real or personal, and whether it be sold for the payment of debts generally, or for certain specified debts, or for the payment of legacies, or for re-investment, "it may be considered as the prevailing doctrine in the American courts, that a purchaser from a trustee is not bound to see to the application of the purchase money; and he will not be held liable for its misapplication, unless the sale is a breach of trust on the part of the trustee, and the purchaser has notice or knowledge, either from the face of the transaction itself, or *aliunde*, of the trustee's violation of duty. Hare & Wallace's Notes, &c., 74.

The distinction which existed in the doctrine upon this subject between this country and England, has been abolished by the Act of 7 and 8 Vic., c. 76, which enacts that the *bona fide* payment to and receipt of any person, to whom any money shall be payable, upon any express or implied trust, or for any limited purpose, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary shall be expressly declared in the instrument creating the trust.

Although in 2 Story, § 1132, the learned author, following the English authorities, says that, "where the real estate is sold for the payment of specified debts or legacies, the purchaser is bound to see that the money is actually applied in discharge of them," yet he states in § 1135, having in previous sections discussed the distinctions adopted by courts of equity upon the subject, that they "lead strongly to the conclusion to which not only eminent jurists, but also eminent judges, have ar-

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rived, that it would have been far better to have held, in all cases, that the party having the right to sell had also the right to receive the purchase money, without any further responsibility on the part of the purchaser, as to its application."

Although there has been no direct adjudication by this Court upon the question as presented in this case, yet in the case of *Williams v. Otey*, 8 Hum., 568, where the property conveyed in trust was personalty, and the debts secured not specifically named, it was held that a *bona fide* purchaser will be protected, though the trust be abused, and that the purchaser is not bound to see to the proper application of the purchase money. Complainant, Loughmiller, was a party to the trust deed, and assented to its provisions. That deed empowered the trustee to sell the land, and pay the money to Harris, to extinguish his debt, and to pay the residue to Dechard. The execution of this trust and duty was imposed on the trustee; and Loughmiller was not released, simply because a sufficient fund came to trustee's hand to pay the debt, unless his failure to pay was occasioned by some wrongful act of Harris. There being no evidence of any fault of Harris, and the debt remaining unpaid, Loughmiller is still liable for it.

The Chancellor's decree upon the original bill will, therefore, be affirmed to this extent; but complainant in that bill, upon the facts disclosed in this record, is entitled to a decree over against the administrator of Venable, for the amount of his liability to Harris; it appearing that Venable, in direct violation of the pro-

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visions of the trust deed, paid debts in his own hands for collection, to the amount of \$1,500, out of the trust fund, leaving nothing to pay the balance of the debt to Harris, which was to be first paid.

Estill does not rely, in his answer to complainant's bill, upon the statute of limitations of two years for the protection of his intestate's estate, which it was, perhaps, his duty to have done. With this modification, the Chancellor's decree will be affirmed, and the cross bill will be dismissed, at the cost of the complainant therein.¹

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1. SPECIFIC PERFORMANCE. *Excessive price. Change of circumstances.* A contract for the sale of lands made during the war, and at the fictitious prices then prevailing, will not be specifically executed.
2. SAME. *Contract not to be executed in part.* A sale of lands to several persons, heirs or tenants in common, purchasing in unequal amounts, at unreasonable prices, as above, if set aside as to part who resist, a specific execution of the contract will not be enforced against those who insist upon its execution.²
3. SAME. *Statute of frauds. Plea of.* It seems that, in some cases, specific performance will be refused, where the contract is not reduced to writing, or the writing does not contain a sufficient description of the property sold, though the statute of frauds is not pleaded or relied upon.

¹ The decree for costs was in favor of the defendants in the original bill, against Loughmiller and his sureties for his appeal, for the costs of the original bill, with a decree in his favor against Estill, administrator of Venable, for the same costs, and decree as above as to the cross bill.

²See *Bell v. Bowers*, 4 Cold., 311.

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4. SAME. *Same. Description of land.* A description of lands in a contract of sale, as lots "No. 1, 175 a, 38 p.; No. 2," etc., of a certain tract, without other description of the lots, is not a sufficient designation for a Court specifically to execute the contract.

Cases cited: *Patton v. McClure*, M. & Y., 344; *Sneed v. Bradley*, 4 Sneed, 301; *McCarty v. Kyle*, 4 Cold., 349.

Code cited: 1757.

FROM LINCOLN.

Chancery Court at Fayetteville, JOHN P. STEELE, Ch., presiding.

JOHN M. BRIGHT, for complainants, cited, on sales of land at auction and statute of frauds: 1 Sugd. on Vend., p. 136, top; Hil. on Sales. On contract admitted and statute not pleaded: *Ellis v. Ellis*, 1 Dev. Eq., 341, 398; *Allen v. Griffin*, 2 Dev. & Bat. Eq., 9; *Dunn v. Moore*, 3 Ired Eq., 364; 4 *Ib.*, 125; 1 White & Tudor Lead. Ca., 521, 522; 2 Sto. Eq., § 755, *et seq.*; 1 Sugd. on Vend., 137, 138, 139; *Sneed v. Bradley*, 4 Sneed, 301. Part performance: 1 White & Tudor Lead. Ca., 521, and cases cited. Contra.: M. & Y., 333; Coupled with admission in answer: 2 Hum., 174; 4 Sneed, 301. Revolution: 1 Kent, 25; Wheaton. As to sales of slaves, same authorities cited by him, *ante* p. 523. On specific performance: 4 Cold., 349.

J. P. DISMUKES, for Gambrel and wife, cited *Nichol v. Ridley*, 5 Yer., 63; 4 Sneed, 373 (?) 473.

J. B. LAMB, for E. C. King and Moore, cited, on statute of frauds: *Pipkin v. James*, 1 Hum., 325; M. &

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Y., 333. On Chancery pleading: *Crockett v. Lee*, 7 Wheat.; *Mayse v. Biggs*, 3 Head, 36; *Earles v. Earles*, 3 Head, 366.

SNEED, J., delivered the opinion of the Court.

The complainant, as executor of the last will and testament of Ephraim King, deceased, brings his bill for the specific performance of a contract by the purchasers of the land and slaves of his testator, alleged to have been sold by him, under the directions of the will, on the 18th of February, 1862, and for an account of advancements, and the settlement of said estate. The defendants are the heirs and devisees of the testator, a part of whom were the purchasers of said land and slaves.

It is alleged in the bill, that the will, after disposing of some specific legacies, gave the entire estate, both real and personal, to the testator's widow, for life, and directed, after her death, the whole to be equally divided among "all the testator's heirs;" that, following the instructions of the will, the complainant, after the termination of the life estate, proceeded to sell the land and slaves to the highest bidder—the land on a credit of one and two years, and the slaves on a credit of one year from the date of the sale; that said land was composed of two tracts, one known as the home place, and the other known as the Cunningham tract, both lying in Lincoln County; that the same was sold in lots as follows: Of the home place, Lot No. 1, 175 acres and 38 poles, was sold to E. C. King, for \$5,081.88; Lot No. 2, 138 acres, 138½ poles, to S. A. King, for \$2,082.98; and Lot No. 3, 183 acres, 120 poles, to Martha G.

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Moore, for \$5,512.50. Of the Cunningham tract, Lot No. 1, 138 acres, 139½ poles, to W. A. King, for \$3,194.06; Lot No. 2, 201 acres, 98 poles, to M. A. Harkins, for \$3,024.18; Lot No. 3, 88 acres, 80½ poles, to A. J. King, for \$1,681.56. The two negroes were sold to A. J. King and John Holly, the man, Green, for \$1,050, to the former, and Anthony for \$950, to the latter. The only memorandum, or written evidence of the sale of the land, is a certificate by the executor, made an exhibit to the bill, in the words and figures following:

"A list of the land and negroes sold at the residence of Ephraim King, deceased, sold as the property of the said Ephraim King, deceased, on the 18th day of February, 1862:

HOME PLACE.

Lot No. 1, 175 a., 38 poles, \$29, E. C. King,...	\$5,081.88
Lot No. 2, 138 a., 138½ poles, \$15, S. A. King,...	2,082.98
Lot No. 3, 183 a., 120 poles, \$30, M. G. Moore,...	5,512.50

CUNNINGHAM PLACE.

Lot No. 1, 138 a., 139½ poles, \$23, W. A. King,...	\$3,194.06
Lot No. 2, 201 a., 98 poles, \$15, M. A. Harkins,...	3,024.18
Lot No. 3, 88 a., 80½ poles, \$19, A. J. King,...	1,681.56
No. 1, negro boy, Green, \$1,050, A. J. King,...	1,050.00
No. 2, negro boy, Anthony, \$950, John Holly,...	950.00

"I certify that the above list is correct, to the best of my knowledge and belief. This, 7th August, 1865.

"JAMES P. HUDSON,

"Surviving Executor."

It is alleged in the bill that all the purchasers took possession of the land respectively bought by them, and the slaves, and that they hold the land to the present

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time, and the slaves were so held by the purchasers of them until the period of their emancipation. But only M. A. Harkins, S. A. King and John Holly executed their notes. W. A. King died not long after the sale, and without executing his notes for the purchase money. He left a widow, Theodosia, in possession of the land, and one child, Laurretta. The defendant, Joshua Gambrel, has since intermarried with Theodosia, and became the administrator of the estate of W. A. King. The bill further states that several of the purchasers will be unable to pay, and that the land will have to be re-sold, in order to realize the amount; that all the purchasers are directly or indirectly interested in said estate as devisees and heirs, or the widows or husbands of such, and having purchased in unequal amounts, an account is prayed, and an adjustment and settlement of said estate, and decree for balances.

The defendants, Joshua Gambrel, and wife, Theodosia, first answer. They admit all the allegations of the bill, the purchase by W. A. King, and the subsequent continued possession. They assent to the specific performance of the contract, and are willing to comply with the terms and conditions thereof as assumed by W. A. King in his lifetime. They insist that the land bought by the defaulting purchasers be re-sold, and if it do not bring as much as they bid, then that they be required to contribute the deficit; that, according to the intention of the testator's will, the sale of the real estate was a conversion into personalty; and the said Joshua insists that the interest of the said W. A. King be paid over to him as administrator, and that the descendants of the child or

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children of the testator who died before the termination of the life estate had no interest in the estate, but the whole belonged to the children living at the termination of said life estate.

The answer of John W. Barham, Nancy Barham and Lauretta King, minors, by their guardian *ad litem*, submits the rights of said wards, and claims for them and Lethe Foster, and another, whose name is not given, all minors and descendants of the testator, one-eighth of said estate, to three-fourths of which the three first named minors would be entitled. It insists that all the heirs of the testator had an interest in the estate devised in remainder, which vested at his death, and that Lauretta had inherited all the rights of her father in said purchase, subject to the dower of her mother, Theodosia.

The answers of E. C. King, and G. W. R. Moore and wife Martha, admit the sale, purchase and possession, as charged in the bill, but resist the enforcement of the contract, upon the ground that the land was sold during the late civil war, at "Confederate prices," which were based upon fictitious values, and that they bid them off at largely more than their value, in order to secure homes near the old family homestead; that they are now poor, and utterly unable to pay the amount bid for the land, and interest, and that if compelled to do so they will be deprived of all share in the estate of their father; and in view of the changed condition of the country, the general impoverishment of the people, and of the peculiar circumstances under which the purchase was made, with the impression, it is stated, that the land would be paid for in the abundant currency of the time, they pray

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to be relieved of the purchase, avowing their willingness to pay the rent while the land has been held by them; that said sale was made under an usurped government, whose acts had been declared null and void by the Constitution of 1865, and that the Court could not lawfully enforce said contract upon them. They ask a re-sale, and an adjustment of all accounts between the devisees and the executor.

The answer of S. A. King admits the purchase and possession, as charged, and the execution of his note for the purchase money, and insists upon the specific performance, as prayed for in the bill, as against himself and all others. He avows his readiness to comply with the terms of the contract, and prays for a general account and settlement of the estate.

Neither of the purchasers of the land, who resist the bill, rely upon the statute of frauds as a defense, in their answer.

The defendant, John Holly, and wife, file an answer and cross bill. They admit the purchase of the slave, Anthony, the execution of the note, and that they took possession of him under their purchase, and held him until public events had made him free. They insist that the executor made a bill of sale to the slave, expressly reserving in himself the title until the purchase money was paid; that he, the said John Holly, tendered the price at the maturity of the note, but the complainant declined it, and refused to make him a title. They charge in the cross bill, that the complainant was guilty of great negligence in attending to the affairs of said estate; that he was slow to enter upon the duties of his trust, and

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that he postponed the sale of said slaves until the country was convulsed in civil war, and that slavery was on the eve of its extinction, as complainant knew, when said slaves were sold; and that in view of the peculiar hardship of the case, their own poverty and utter inability to pay, they pray to be relieved from said sale, and that the same be declared void as to them, because no title had vested in them.

The complainant answers the cross bill, denying all its charges. He states that there was no lien reserved, and that the title passed to the said John Holly by the sale and delivery and bill of sale; that the said Holly, on his purchase, took the title, possession and risk of the property, and that he retained no lien upon said slave. He denies the alleged tender of the money, but states that the said Holly did once propose to him to exchange the bill of sale for his note, but he declined. The bill of sale is not exhibited, and there is no proof in the cause.

The Chancellor held the sale of the land and negroes to be a valid sale, and decreed a specific performance of the terms thereof. An account is ordered against the purchasers, and against the executor, as to the debts and assets of the estate, and a settlement of all matters between the heirs and devisees and the executor, allowing due compensation to the latter, and an account of solicitor's fees. In construing the will, which is not exhibited in the record, the Chancellor held that the intention of the testator was to convert all his property into money, and thus to have it distributed among his heirs and legatees, upon the termination of the life estate; that all the living children and descendants of deceased children were

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entitled to share in the estate, the children in equal parts, and the descendants of deceased children as classes, each of which would represent their deceased parent, and the great grand-children taking as a class the interest of their deceased parents; that the share of W. A. King be paid to Joshua Gambrel, his administrator, to be administered according to law, or applied to the indebtedness of the estate of the said W. A. King to the estate of the testator.

The defendants, E. C. King, G. W. R. Moore and wife, Martha, and John Holly and wife, Mahala, presented, after the decree, a petition for re-hearing, setting forth the great hardship of the case as against them, in view of all the circumstances, and relying upon the statute of frauds as a defense against said bill, so far as it sought to enforce said contract for land. The prayer of the petition was disallowed, and the petition dismissed. The defendants appealed, but only the defendants King and Moore and wife gave bond.

The will is not copied into the transcript, and we can not, therefore, judge of the correctness of that part of the Chancellor's decree which interprets the intention of the testator as to the manner of the transmission of his estate.

But in other respects, there must be a modification of the decree.

The jurisdiction of a court of equity, in decreeing a specific performance of an agreement, is a peculiar jurisdiction, in the exercise of which that forum becomes, of its own inherent strength, a court of conscience. It is said that equity follows the law, and this proposition is abstractly

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true; but, in the exercise of this jurisdiction, it sometimes, says Mr. Justice Story, "goes far beyond the law:" 2 Eq. Jur., § 741. It was a remark of Lord Redesdale, that the ground of this jurisdiction in a court of equity, is in its capacity to do complete justice: *Harnett v. Yielding*, 2 Sch. & Lefr., 552. The court of equity, in the exercise of this jurisdiction, would fall far short of its functions and its duties alike, if it did not take a broader view of the rights of parties than is sanctioned by the sterner rules of the common law. It is said to be "a discretionary jurisdiction," not, indeed, of arbitrary or capricious discretion, dependent upon the mere pleasure of the Judge, but of that sound and reasonable discretion which governs itself as far as it may, by general rules and principles; but at the same time, which withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties: 2 Story Eq. Jur.; § 742. And it is stated by Lord Redesdale to be one of the special grounds why a court of equity will not decree a specific performance of an agreement, when, from the circumstances, it is doubtful whether the party meant to contract to the extent that he is sought to be charged: 2 Story Eq., § 716, note 1. If such was a recognized doctrine of English jurisprudence in the beginning of the present century, with much more force may we apply it to transactions occurring during the late war, if indeed we could not evoke from that extraordinary period some broader and more catholic doctrine fairly deducible from the great principles of equity jurisprudence. We hold that, in adjust-

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ing the rights of parties which accrued to them during the late civil war, we can not, consistently with the principles which give life and spirit to a court of equity, close our eyes to the circumstances which then surrounded them. In the language of Chief Justice Chase, "contracts made among them must be interpreted and enforced with reference to the condition of things created by the act of the governing power:" 8 Wal., 13. We can not ignore the existence of a rampant and bloody revolution, which pervaded all civil society and unsettled the courses and currents of social, commercial and domestic life. We can not close our eyes to the fact that, in that struggle, the energies of trade, naturally elastic, were paralyzed by the perils which beset our people by land, and by the blockade of our seaports; that this state of things had destroyed our standard of values, and commerce itself became the foot-ball of military caprice. We can not forget that there was no money, silver, gold or bullion, by which to measure the values of trade and commerce, and that the fortunes of war had forced upon the people a plethora of currency of an arbitrary commercial value, with which they built their navies, marshaled their armies, carried on a gigantic war, while for four years their own internal commerce had no other basis, no other standard of value; that this currency was their money, their gold, their silver, their all; that it supplied them with raiment. It bought their daily bread. It supported the living; it buried the dead. It paid their soldiers, their farmers, their mechanics, their teachers, their doctors, and it was the basis of all their contracts. We can not forget that the country was full of this re-

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dundant currency, whose circulation was enforced by public opinion and military power, and that the very plethora of this circulation had given a fictitious value to every article of trade and every species of property, both real and personal. Nor could a court of equity, in such case, shut out the picture of desolation, of broken fortunes, of ruined homesteads, of scattered and impoverished families, and the heavy burden of utter bankruptcy and gloom which, at the close of the late civil war, rested upon the country. The defendants who resist the prayer of this bill, have, by the ground of their defense, brought these considerations squarely before us; and we have no hesitation in laying it down as a principle, that courts of equity in determining the rights of parties in a case of this kind, should interpret those rights by the light of surrounding circumstances, and with reference to the motives, hopes, prospects and conditions under which the transaction occurred where it can be done without too great a departure from well-established principles. The parties have not specially relied on the statute of frauds in their pleadings as a defense against this bill. Yet, in a case like this, we could not allow a technical rule to defeat the demands of substantial justice. In view of the imperative terms of the statute, we hold that, irrespective of the pleadings, no court could enforce a contract of this nature, if void under the statute; nor could any court legally entertain such an action, unless, perhaps, in the case where the adverse party has acquiesced in the enforcement of the agreement, or has in some way estopped himself from resisting it by having accepted the whole or a partial benefit under it: 14 Johns., 15; 1

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Johns., Ch. 273; 2 Bouv. L. D., 323. No action shall be brought, says the statute, whereby to charge any person, upon any contract for the sale of lands, tenements or hereditaments, * * * unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized: Code, 1758. We apprehend that the object of the statute would be met if the memorandum were sufficiently specific to enable the officers of the court to go into the country and find the land, and enforce its decrees against it. An old English case is sometimes referred to, where the conveyance was of "a farm in the tenancy of A," without any further description; and the Court held the memorandum sufficient. Sheph. Touch. But the course of decisions in Tennessee has not favored this loose construction of the statute. Judge Catron regretted that the statute had been so far departed from in the English decisions. He said it had been followed by an "appalling train of litigation" in that country; and he cited it by way of warning to the courts of this State not to fall into the same error: *Patton v. McClure*, M. & Y., 344. The objects of the statute, said Story, are such as its very title indicates, "to prevent the fraudulent setting up of pretended agreements, and then supporting them by perjury. Another object was, to preserve the terms of the contract in some enduring and exact form, not dependent upon the frailty or the honesty of human witnesses. And courts of equity, before the passage of the Act of Car. II, c. 3, always

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refused to decree a specific performance of parol contracts, unless confessed in the answer, or unless they were already partly performed: 2 Story Eq., Jur., § 753. By the same authority it is said that courts of equity will enforce the specific performance of a contract within the statute, not in writing, when it is fully set forth in the bill, and is confessed by the answer of the defendant. The reason, says Judge Story, is, that the statute is designed to guard against perjury and fraud, and in such case, there can be no danger of that sort. Perhaps, says he, another reason might fairly be added, and that is, that the agreement, originally by parol, is now in part¹ evidenced by writing, under the signature of the party, which is a complete compliance with the terms of the statute: 2 Story Eq. Jur., § 755; *Sneed v. Bradley*, 4 Sneed, 301. It is immaterial under the statute as to the form of the instrument or the time of its execution, or as to the number of papers which, connected together, make out the memorandum, if they inherently show it without the necessity of resorting to parol evidence to identify the land and explain the contract. It may be executed at any time after the contract and before the action. It is doubted whether it might not be after the action brought, because the statute only means to secure written evidence of the contract. The general rule is stated thus: "It must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties." Brown on Frauds, §§ 348, 371.

¹ Qu., "fact?"

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We hold that the memorandum of the sale of the land in this case is not sufficient under the statute of frauds, and that consequently the sale of the land on the 18th of February, 1862, was a nullity, if this be the only written evidence of it. Upon the other considerations discussed, involving the jurisdiction of a court of equity in decreeing the specific performance, even of a void contract, all parties assenting, we would have no difficulty in so pronouncing in this case as to some of these parties, but for the fact that they invoke in their answer the aid of the Court in enforcing the contract against all the others, while they consent to such enforcement as to themselves. Under these circumstances, if we can not enforce it as to the parties objecting, we ought not to enforce it against those assenting, as they deprecate that result in their answers, and it might, peradventure, operate harshly as to them. Though the parties objecting have not relied in their answers upon the statute of frauds, yet a court of equity will always snap the cords of a mere technical restraint, when it stands in the way of substantial justice. There are cases in which parties must specially plead the statute, or specifically rely on it in their answer; but we are not sure that this is one of them. This court has laid down a rule upon this doctrine of specific performance, which is of general application, that "a specific performance of a contract will not be decreed when it is hard or unreasonable in itself, or when, from mutual change of circumstances since the contract, the performance would be attended with particular hardship: *McCarty v. Kyle*, 4 Cold., 349. These parties have represented such to be the

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effect of this enforcement, in their sworn answers. The complainant has chosen to present his case without proof; and even if the memorandum of the contract were above suspicion, a court of equity would hesitate long in such a case.

The sale of the real estate will be set aside, and the executor will re-sell the same in pursuance of the will. The notes executed for purchase money will be surrendered for cancellation. The purchasers of the slaves will be required to pay for them. In such case, the law is well settled in this State. The purchasers of the land will be required to account for rents, and be entitled to credit by the value of all permanent improvements. The costs of the cause will be paid by the executor out of the funds of the estate; and in all other respects, except as hereinbefore indicated, the decree of the Chancellor will be affirmed. With these modifications, the cause is remanded for further proceedings.

WM. F. DAVIDSON v. M. B. MOORMAN.

1. CONSTITUTIONAL LAW. *Legislature. Special session.* By art. 3, s. 8, of the Constitution, the General Assembly, at a special session, is prohibited from entering upon any legislative business except that for which they were especially called together.
2. SAME. *Redemption. Extension by Act of 1861, void.* The act of June 28, 1861, c. 20, s. 2, providing that debtors or *bona fide* creditors shall have

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three years in which to redeem real estate sold, having been passed at an extra session, and that not being the business for which they were called together, is void.

FROM BEDFORD.

Writ of error to the Chancery Court at Shelbyville, to reverse a decree of JOHN P. STEELE, Ch.

R. B. DAVIDSON & H. L. DAVIDSON, for complainants.

PLAYER MARTIN, for defendant, insisted that the act of 1861, c. 20, was void. He cited Governor's Messages, Session Acts, 2nd extra session, 1861, pp. 3 and 11; *Mitchell v. Col. Tp. Co.*, 3 Hum., 456; *Henderson v. Felkner*, 1 Heis., 271.

TURNEY, J., delivered the opinion of the Court.

The decree of the Chancellor, dismissing the bill for want of equity on its face, is a proper one.

On the 25th of November, 1865, the Sheriff of Bedford county, by virtue of an execution from the Circuit Court of that county, sold a lot of land in the town of Shelbyville, belonging to complainant. Defendant became the purchaser, at the price of one hundred and fifty dollars.

On the 19th day of February, 1868, complainant proposed to redeem, and made a tender to defendant of the purchase money, together with interest and charges, which was declined; whereupon this bill was filed, alleging the foregoing facts, and praying that complainant be permitted to redeem.

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The bill is based upon s. 2, c. 20, of the Act of 28th June, 1861, entitled "An Act to extend the time for the redemption of real estate," providing: "*Be it further enacted*, That, in all cases where real estate shall hereafter be sold, subject to redemption, the debtor or his *bona fide* creditors shall have three years in which to redeem said real estate, in the manner now prescribed by law. This Act to take effect from and after its passage."

This Act was passed at an extra session of the Legislature, assembled on proclamation of the Governor. Article 3, s. 9, of the Constitution, then the Supreme law of the State, provides: "The Governor may, on extraordinary occasions, convene the General Assembly by proclamation, and state to them, when assembled, the purposes for which they shall have been convened; but they shall enter on no legislative business except that for which they were especially called together."

Under this provision in the Constitution, the Legislature convened on the 25th of April, 1861; remained in session until the 9th of May, when it adjourned under a resolution to réassemble on the 18th of June, at which time it did convene, and continue in session until about the 5th of July. Governor Harris, at this extra session, submitted two messages—one of the 25th of April, and the other of the 18th of June. Except a recommendation to elect a State Librarian in the room of R. J. Meigs, who had resigned, both these messages are confined to a discussion of the military and political interests of the State, without reference, directly or remotely, to municipal enactment, regulation or amendment. It

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follows that the Legislature, in the passage of the Act referred to, entered on legislative business for which they were not especially called together; and the statute is a nullity. This is decisive of the case, and relieves us of the consideration of the question touching the "so-called" Schedule of 1865, to the Constitution of the State.

Affirm the decree.

E. D. FISH v. GREEN CANTRELL.

NEW TRIAL. *Affidavits of jurors. Not to be heard.* Circuit Judges should not allow affidavits of jurors to be read on applications for new trial, except in extraordinary cases.

FROM DEKALB.

Appeal in error from a judgment of the Circuit Court,
M. M. BRIEN, J., presiding.

R. CANTRELL, for defendant in error.

NICHOLSON, C. J., delivered the opinion of the Court.

This is an action of trespass *quare clausum fregit*. The trespass alleged was, in entering upon the premises of defendant in error, and plundering his house of clothing, jewelry and other articles, and taking away a mule. The plea was, not guilty.

The proof shows that in the fall of 1863, a squad of Federal soldiers, belonging to the command of Col. Black-

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burn, were out on a scout, in search of Confederate soldiers; that plaintiff in error was along as a guide, though he did not belong to the army. The squad of soldiers stopped at the house of defendant in error and plundered it, as alleged in the declaration, abusing him, and threatening to hang him to an apple tree. Plaintiff in error was along, but did nothing, except to help catch and carry off a mule, to get a suit of gray clothes, and a lot of finger rings and ear-bobs.

Under a charge by Judge Brien, which is not objectionable, the jury found a verdict for the defendant in error for \$85.

A motion for a new trial was made, based upon an affidavit by plaintiff in error and three others, two of whom were jurors. These jurors swear that their verdict was based upon the taking and carrying away of the mule. One of the other affidavits stated that the mule had been returned to defendant in error, and plaintiff in error swore that he did not know, at the time of the trial, that the mule had been returned to plaintiff in error. He believes if he had known this fact, in time to make the proof, the result would have been different.

The Circuit Judge overruled the motion for a new trial. There was no error in this. It is time that Circuit Judges had ceased to allow the affidavits of jurors, as to the grounds of their verdicts, to be read on motions for new trials, unless in extraordinary cases.

Outside of the mule, the value of which was not proven, the trespass proved would have justified a much larger verdict.

There is no error in the judgment, and it is affirmed.

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NASHVILLE AND CHATTANOOGA RAILROAD CO. v.
NANCY PRINCE.

1. INJURIES RESULTING IN DEATH. *Right of action. Damages.* Under the Code, 2291, the administrator of a person instantly killed by the act of another has a right of action, for the use of the wife and children of the deceased, and the damages are to be estimated, not only by the pain and suffering of the deceased, but also by the loss and deprivation occasioned to the wife and children.
2. SAME. *Evidence.* The character of the deceased as a drunken, worthless man, making no provision for his family, but being a burthen to them for his support, is proper matter to be proved in mitigation of damages.

Case overruled: *Louisville and Nashville Railroad Company v. Burke*, 6 Cold., 45.

Code construed: 2291.

FROM BEDFORD.

ED. COOPER and THOS. C. WHITESIDE, for plaintiff
in error.

Mr. WHITESIDE cited, to show that the action would be defeated by negligence of the deceased: *E. T. & Ga. R. R. Co. v. St. John*, 5 Sneed, 524, 430; *L. & N. R. R. v. Burke*, 6 Cold., 45; *Whirley v. Whiteman*, 1 Head, 610; *Cogdell v. Yett*, 1 Cold., 230; Sedgwick on Dam., 494, 496; 2 Greenl. Ev., § 94; *Moshier v. W. & S. R. R. Co.*, 8 Barb., (S. C.,) 42; *Horne v. M. & O. R. R. Co.* As to instantaneous killing, he cited 6 Cold., 45; *Kearney v. Boston & W. R. R. Co.*, 9 Cushing, 108.

MR. COOPER cited, on statutory precautions: *Hollenbeck v. Berkshire R. R.*, 9 Cush., 481; 6 Cold., 45; *Sher-*

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man & Redfield on Damages, 332. On negligence: *Stevens v. Oswego R. R.*, 18 N. Y., 422; *Duscomb v. Buffalo R. R.*, 27 Barb., 221; 10 Ired., 402; 44 Penna., 375; 6 Cold., 57 (?); 8 Rich., 120; 28 Ga., 93; 37 Ga., 503; 2 McMillan, 403; Sher. & Redf., § 487. On damages: 6 Cold., 57 (?); *Penn. R. R. Co. v. Wardour*, 20 Penn., 29; *Penn. R. R. Co. v. Kelly*, 31 Penna., 372; Sher. & Redf., p. 669, *et seq.* On evidence of character, to mitigate damages: *Ib.*, n. 4; 8 Barb., 368; 32 Barb., 25.

W. H. WISENER, for defendant in error, cited 6 Cold., 46, 589; 5 Wallace, 90; Code, 2291, 1167, 1168; Sher. & Redf. on Negligence, 300 and n.; 2 Redf. on Railw., 250, 251; Pierce on Railw., 256 and n.

J. A. WARDER, with him, cited Code, 1167, 1168, 1169; *M. & C. R. R. Co. v. Dean*, 5 Sneed, 291; *E. T. & Ga. R. R. v. St. John*, 5 Sneed, 524; 18 N. Y., 422; *Brooks v. Buffalo R. R. Co.*, 25 Barb., 600; 30 N. J., 188; *Illinois Central R. R. v. Buckner*, 28 Ill., 299; *Murf. & W. Tp. Co. v. Barrett*, 2 Cold., 508; *Hervey v. Wilmington R. R. Co.*, 10 Ired., 402; *Sims v. Macon R. R. Co.*, 28 Ga., 93; *Holmes v. Central R. R. Co.*, 37 Ga., 593; *Felder v. Lou. R. R. Co.*, 2 McMullen, 403; *Richardson v. Wilm. & Manc. R. R.*, 8 Rich., 120. Many of these were cited to show that they were not according to the rule as held in Tennessee. On the construction of the Code, 2291, he cited 9 and 10 Vict., —; *Blake v. Midl. R. R. Co.*, 10 Eng. Law and Eq., 437; *Oldfield v. N. Y. & Haerlem R. R.*, 14 N. Y., (4 Kernan,) 310; N. Y. statute of 1849, and 18—; Mass. statute of 1842;

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Coml. v. Boston & Worcester R. R., 11 Cush., 512; 9 Cush., 481; *Mann v. Boston & Wor. R. R.*, *Ib.*, 108; *Bancroft v. Same*, 11 Allen, 341.

NICHOLSON, C. J., delivered the opinion of the Court.

This is an action of trespass, instituted in June, 1860, in the Circuit Court of Bedford County, by Nancy Prince, administratrix of Jeremiah Prince, deceased, against the Nashville and Chattanooga Railroad, to recover damages for the killing of the said Jeremiah Prince, who was the husband of said Nancy Prince. The declaration alleges that, on the — day of —, 1860, the Railroad Company did, illegally and violently, with engine, tender, passenger and freight cars, run over the said Jeremiah Prince, from which illegal and violent running over the said Jeremiah Prince died; wherefore an action hath accrued, in the name of said Nancy Prince and children, to recover of and from the Nashville and Chattanooga Railroad such damages as they may have sustained, by reason of the said Company thus depriving Jeremiah Prince of his life.

To this declaration, defendant below filed a demurrer, which was overruled. Defendant then filed two pleas: First, that Nancy Prince is not the administratrix of Jeremiah Prince; and, second, not guilty, on each of which there was issue.

Upon the trial of the cause, at the April Term, 1868, the jury rendered a verdict for the plaintiff below for \$3,800, on which judgment was given, from which there was an appeal in error to this Court.

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From the bill of exceptions, it appears that on the 7th or 8th of April, 1860, Prince started from Shelbyville, late in the evening, in the direction of his home, about a mile and a half from the town, near the public road. He was seen, on his way homeward, about one hundred or one hundred and fifty yards from the point on the railroad where he was killed. He was in a drunken condition. At about 8 o'clock at night, a train of cars came from Wartrace, going to Shelbyville, which run over him, nearly severing his head from his body, and otherwise greatly mangling his body. The point at which he was killed was about a mile from Shelbyville, and three-quarters of a mile from the depot. The train was running at the rate of from six to eight miles an hour. There was no head-light on the train. No whistle was sounded, or bell rung. The fireman was on the lookout at the time, but failed to discover the deceased until he was run over. In approaching the point where the deceased was run over, the train ascended a grade, and reached the summit about seventy-five yards short of the point of collision, and it was a descending grade from the summit to that point. There was a curve in the track near the summit, and a head-light would not have discovered the deceased, in consequence of the curve, until the summit was passed; and if deceased had been discovered after the summit was passed, it would have been impossible to stop the train before it reached the point of collision.

In the progress of the trial, the plaintiff in error offered to prove, by several witnesses, that Prince was a drunken, worthless man; that he provided nothing for

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his family, and consumed what his family supplied. This evidence was objected to, and the objection sustained, and the evidence rejected. This ruling of the Court is objected to, as erroneous.

It is to be observed, that the grounds on which the plaintiff below claimed to be compensated, as set out in her declaration, is for such damages as she and her children may have sustained by reason of defendant below having deprived of his life the husband of the plaintiff, Nancy, and the father of the children. No other claim for damages is made in the declaration.

It is manifest that this evidence was erroneously rejected, if the plaintiff below was entitled to recover for the damages which she and her children had sustained by the death of the husband and father. The Circuit Judge excluded the proof from the jury, upon the assumption that in this action such damages could not be recovered. It is obvious, that, if the plaintiff below was not entitled to recover damages for the loss of her husband, then she could recover none whatever in this suit, as she claimed none other in her declaration.

This raises the important question, whether damages sustained by a wife and children, in consequence of the killing of the husband and father, can be recovered in an action instituted under the Code, 2291. That section is as follows: "The right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act or omission of another, would have had against the wrong-doer, in case death had not ensued, shall not abate or be extinguished by his death; but shall pass to his personal representatives, for

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the benefit of his widow and next of kin, free from the claims of his creditors."

It is not controverted that one object of this section was to prevent the abatement of the right of action, which a person has who has received personal injuries, from which such person afterwards dies. Nor is it material whether the person so injured had commenced his action before his death or not. In either case, this section prevents the abatement of the right of action, and transmits it to his personal representatives, for the benefit of his widow or next of kin. Looking to the obvious purpose of the Legislature in this alteration of the common law, we are satisfied it was intended that the representative of a person who had died from personal injuries, should have the right to recover damages, not only for the mental and bodily suffering, loss of time, and necessary expenses resulting immediately to the deceased from the personal injuries, but also for the damages resulting to the parties for whose benefit the right of action survives, from the death consequent upon the injuries received.

But does the section of the Code under consideration, include and provide for a case in which the injury produces instantaneous death? The answer to this question must depend upon the intention of the Legislature, as the same is to be ascertained from the language used. It will be observed that two classes of cases are provided for in the section, connected together by the use of the disjunctive conjunction, "The right of action which a person *has* who dies from injuries received from another." This language describes one class of cases—those in which death results after the injuries received, but not instantaneously,

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as we understand the language. As to the second class, "The right of action which a person, whose death is caused by the wrongful act or omission of another, *would have had* against the wrong-doer, in case death had not ensued, shall not be extinguished by his death." This is the second class of cases. One class embraces rights of action which the person *has* who dies from injuries received; the other class, rights of action which the person "*would have had* whose death is caused by the wrongful act or omission of another," etc. The distinction between the two classes of cases is by no means clear. If there is any difference, it is in this: That the language used in describing the second class, more clearly includes cases of instantaneous death than that used in describing the first class; and we infer that the language was used in the alternative, with the view of more distinctly indicating the purpose of the Legislature to include cases of instantaneous death, as well as those of death ensuing from injuries previously received. But whether the Legislature used the two different forms of expression for the purpose suggested, or not, it can not be controverted that the language, "whose death is caused by the wrongful act or omission of another," includes cases of instantaneous death; and the language which immediately follows, "would have had against the wrong-doer, in case death had not ensued, shall not abate and be extinguished by his death," necessarily means that the representative of the deceased person shall have a right of action, whether the deceased died after the injuries were received, or died simultaneously with the infliction of the injury which caused death; and this right of action is to be for the benefit of the widow or next of kin.

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It follows, that the representative of the deceased has a right to recover damages sustained by this widow and children in consequence of his death, whether the death resulted instantaneously from the injuries or not. It would have been absurd to give the right of action for damages for the mental and bodily sufferings of a person whose death was instantaneous. Yet a right of action is given for the benefit of the widow or next of kin. It follows, that the damage intended to be provided for, was the loss of husband or father. Such, we are satisfied, was the intention of the Legislature, and we think their intention is manifested with sufficient distinctness in the language employed.

This Court, in the case of *Louisville and Nashville Railroad v. Burke*, 6 Cold., 45, put a different construction on the section of the Code under consideration. But, as we can not concur in the construction placed, in that case, upon the section, as to the point under examination, we are constrained to overrule so much of the decision as relates to the particular question herein discussed.

It follows, that, in estimating the damages sustained by the defendant in error, it was legitimate for the plaintiff in error to show by proof that the deceased was a drunken and worthless man, and made no provision for his family. These were legitimate facts to be considered in estimating the damages. The rejection of such proof was erroneous. For this error, which is repeated in the charge of the Court, the judgment is reversed, and the cause remanded for another trial.

As the cause is to be re-tried, we deem it unnecessary to notice the various other questions discussed in the argument.

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ROBERT MATTHEWS *et als.* v. JACOB F. THOMPSON *et als.*

1. COMMISSIONER. *To sell, may receive payment.* A commissioner to sell land, with authority to take notes payable to himself, has authority to receive payment of the notes taken, when they fall due.
2. SAME. *Same. Confederate notes.* Where the commissioner, in good faith, received payment in Confederate notes, and submitted to a decree against him for the amount, in dollars, it was held to be a good payment as to the purchasers, and that they were discharged.¹

Case approved: *Henley v. Franklin*, 3 Cold., 475.

Cases cited: *Cross v. Sells*, 1 Heis., 83; *Naff v. Crawford*, *Ib.*, 111; *Dietz v. Mitchell*, MS.²

FROM BEDFORD.

Appeal from the decree of the Chancery Court at Shelbyville, JOHN P. STEELE, Ch., presiding.

THOS. C. WHITESIDE, for complainant, commented on *Henley v. Franklin*, 3 Cold., 472; cited *Carnes v. Polk*, 4 Cold., 87; *Sto. on Agency*, §§ 93, 126, 181; *Walker v. Walker*, 4 Cold., 300; *Stewart v. Donelly*, 4 Yer., 177; *Shurer v. Green*, 3 Cold., 419; 10 Yer., 389; *Crutchfield v. Robins*, 5 Hum., 15, 18; *Smith's Mer. Law*, 59; 5 Yer., 71; *Lancaster v. Allen*, 1 Head, 326-328; *Turner v. Pettigrew*, 6 Hum., 438-440; 3 Monroe, (?) 505; *Hill on Trustees*, 812, 813.

W. H. WISENER, Sr., for defendants, cited *Touchstone v. Touchstone*, ante, 513; 3 Cold., 192; 2 Sneed, 204.

EDW. COOPER, with him, cited 3 Cold., 472; *Jones*

¹ See *ante*.

² Decided January 18, 1871.

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v. *Thomas*, 5 Cold., 465; 4 Cold., 300; *Ib.*, 87; *Cross v. Sells*, 1 Heis., 83; *Naff v. Crawford*, 1 Heis., 111; *Pennington v. McWhirter*, 8 Hum., 130; *Touchstone v. Touchstone*, ante, 513; 38 Ga.; *Williams v. Bowman*, 3 Head., 678; *Williamson v. Smith*, 1 Cold., 1.

JOHN W. BURTON, on the same side, cited *Campbell v. Miller*, 38 Ga.; *King v. King*, 37 Ga., 205; with other authorities cited above.

NELSON, J., delivered the opinion of the Court.

At the instance of Robert Matthews, guardian of the minor children, and Rebecca Matthews, administratrix of the estate, of Andrew Matthews, deceased, the land and slaves belonging to his estate were sold, pursuant to a decree pronounced by the Chancery Court at Shelbyville, at its September Term, 1859. Under said decree, nineteen slaves, who had been held by the intestate as trustee for three of his minor children, were also sold. William J. Whitthorne, Clerk and Master of the Court, was appointed commissioner to sell the lands, and Robert Matthews, the guardian, was appointed commissioner to sell the slaves. The commissioners made their reports of sales, which were duly confirmed by a decree of said Court, pronounced 10th of May, 1860, when a further order was made, directing a sale of part of the real estate and four slaves, who had not been sold. The notes for the sale of the slaves amounted to \$20,669.50. At the March Term, 1861, a report and petition were presented by said Robert Matthews to said Chancery Court, in which he prayed that, "in consideration of the

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monetary crisis, and the stay laws passed at the late called session of the Legislature," he might be authorized to extend the time of payment of the sale notes until the 25th of August, 1861, or such other time as might be directed, by taking further security; and it was ordered by the Court, "that Robert Matthews shall have leave, and he is hereby empowered to renew all the notes mentioned in said report. * * That the same relative position which the parties now occupy to the Court and to the commissioners aforesaid, shall be, and still remain in all such renewals of said notes mentioned in the report aforesaid; and that said Robert Matthews, as commissioner aforesaid, shall have discretionary power to contract with the said parties, and to renew the same up to the time mentioned in the petition and report; and that they shall all remain before the Court in the same position as to the rights of the commissioner aforesaid, that said makers and securities now occupy before this honorable Court."

The proceedings in the Chancery Court appear to have slumbered until March, 1865, when, upon the petition of the minors by their next friend, Rebecca Matthews, and of the said Rebecca as administratrix, representing that the said Robert Matthews had collected and failed to pay over the fund, a decree was rendered against him for \$26,153.10, and the costs of the motion. An execution was issued upon this decree, on the 1st of May, 1865; but on the 23d of June, 1865, Mrs. Matthews authorized the Sheriff, in writing, to stop all further proceedings, and return the execution not satisfied. On the 13th of September, 1865, a bill in the nature of a bill of

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review, was filed by Robert Matthews, commissioner, and Rebecca Matthews, administratrix, against the minor heirs of Andrew Matthews, deceased, to which an amended bill was filed, 13th September, 1866, and an amended and supplemental bill on the 13th of March, 1867, under leave from the Chancellor. In these bills, the said Robert Matthews sought to be relieved of the decree obtained against him at the instance of Mrs. Rebecca Matthews, during his absence, and alleged that the various debtors, or the larger number of them, had paid their notes in Confederate money; that said payments were void, and that they should be compelled to pay the same in good funds. It appeared, in the progress of the causes, that Matthews sympathised with the rebellion, and had, perhaps, left home on account of the approach of the Federal army, and that Mrs. Matthews had filed the bill against him to obtain a lien on the property and save the same from confiscation in the Federal Court, at Nashville; that the proceeding was not hostile in its purpose, and that when he returned, and the danger in the Federal Court had passed away, she had no desire to enforce the decree.

By leave of the Court, on the 20th of March, 1868, William H., Arthur P. and Andrew F. Matthews, filed their cross bill, to which Robert Matthews, the surviving debtors, and the personal representatives of deceased debtors, were made defendants, and in which they prayed a decree for the amount of the notes, &c.

But it is unnecessary to recite here the various demurrers, answers and interlocutory orders contained in this voluminous record, or to particularize certain par-

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tial payments made in bank notes, as the determination of the cause must rest upon the questions made in behalf of and common to all the debtors and those representing them.

The Chancellor; being of opinion that Robert Matthews, having received the Confederate Treasury notes willingly, in payment of the notes in his hands, as commissioner, was not in a situation to impeach the payments, but that the minors were entitled to relief, because there was no final decree settling the rights of the parties when Robert Matthews, the commissioner, received Confederate notes in satisfaction, and that he had no authority, as commissioner, to receive payment; pronounced a decree on the 28th of November, 1868, declaring the payments in Confederate notes illegal and invalid; directing an account, charging the said Robert Matthews with the said sum of \$26,153.10, and with the sales of any other negroes not included in his report, and with any debts lost by his negligence; and crediting him with all sums of money paid for the use and benefit of the distributees, &c.; and dismissing the amended bill filed by said Matthews. The Chancellor further decreed, that complainants in the cross bill recover of Jacob F. Thompson and his securities, \$7,992; of Thompson B. Ivie and R. L. Thomas, an unpaid balance of \$1,948.79; of the executors of Robert Cannon and William S. Jett, \$4,440; and of A. L. Landis, 1,332; said sums to be subject to any credits for Confederate money paid by them, and actually used by the commissioner for the benefit of the distributees of Andrew Matthews, deceased. The costs of the cross bill were adjudged against the de-

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fendants thereto, and of the bill of review against Robert Matthews; from which decree the defendants to the cross bill, alone, prayed and obtained an appeal to this Court.

Without tracing the shades of difference in the answers of the various defendants, it may be stated in general terms, that the recoveries against them were obtained for the amounts of principal and interest due on notes executed by them or those they represent, to Robert Matthews, the commissioner, upon the sale of slaves, which notes, with the exception of certain partial payments in bank notes, they paid to him in Confederate Treasury notes, chiefly on the 10th of November, 1862, though one of said notes was paid as late as the 5th of December, 1862. It does not appear that there was any coercion or duress in these payments; and the questions principally discussed before us relate to the powers of the commissioner to receive payment under the decree, and the validity of the payments as made.

1. The decree pronounced at March Term, 1861, authorizing the commissioner to renew all the notes mentioned in his report, and conferring upon him "discretionary powers to contract with the said parties, and to renew the same up to the time mentioned in the report," necessarily implies that the notes were made payable to the commissioner; and although none of the notes are exhibited, or copies thereof contained in the record, it may be inferred from the fact that the sales were made in the Spring of 1860, before the commencement of the late civil war, and at a time when there was but a slight difference in value between current bank notes

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and gold and silver, that the notes were originally made payable in dollars, and were so renewed. The appointment of special commissioners, and the regulation of their duties and liabilities, are, to some extent, provided for or alluded to in the Code, 329, 776, 3610, 4052. Under section 3610, they are liable, on motion, in the same way and to the same extent, as the Clerks of the Courts; and by section 4050, sub-section 5, the Clerks are authorized to receive the amount of any judgment or decree rendered in the courts of which they are Clerks, either before or after execution. Although the precise powers, duties and liabilities of special commissioners are not defined in the Code, it may be fairly presumed, from the nature of their office or trust, that the power to take notes necessarily implies the power to receive payment in satisfaction of them; and we hold that, although the commissioner may not have been required to execute a bond, because he also held the office of guardian, he had full authority to collect the amounts of said notes, or to receive payment when tendered. Being a trustee, it is immaterial to consider whether he acted as commissioner or guardian, as he would be liable in either character; and neither he nor his securities are before this Court.

2. But the question as to whether the commissioner could lawfully receive Confederate Treasury notes in payment, is of higher importance, and was, at one time, by no means free from embarrassment. The difficulties attending it have, however, in a great measure, been removed by decisions made as well by our predecessors as ourselves. There is no evidence in the record to show any fraud or collusion between Matthews and the makers

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of the notes. Matthews had unbounded confidence in Confederate money, and acted in this transaction as he would have acted, according to the proof, with his own property. He risked his own judgment in receiving Confederate notes, when the contracts were made payable in dollars, and abides by it in submitting to the decree made against him personally. It does not follow that because he is liable to his wards, or to the beneficiaries of the trust fund, that payments to him, made in good faith, were of no validity as between him and the payors of the notes. Such payments, thus made, were valid, according to the strictest holding of our immediate predecessors, as executed contracts. The case of *Henley v. Franklin*, 3 Cold., 475, was, in several particulars, similar to this. There, the Clerk, acting as commissioner, was directed to collect the sale notes; and, having received Confederate notes in payment, on the 1st of February, 1862, and executed a receipt therefor, on his execution docket, it was held that the payment to him was a satisfaction of the debt, although it was declared that he was "responsible over, under his bond as commissioner, to the plaintiff in the motion." While we do not hold that Confederate notes, in the quaint language of previous cases, were "an unlawful and illegal currency," we have considered such payments, as well as those made in current bank notes, when made in good faith, valid on other grounds. See *Cross v. Sells*, 1 Heis., 83; *Naff v. Crawford*, *Ib.*, 111, and *Dietz v. Mitchell*, determined at the present term.

Reverse the decree, and dismiss the bill, at complainant's costs, as to all the defendants who appealed.

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JAMES A. QUINBY & Co. v. NORTH AMERICAN COAL
AND TRANSPORTATION COMPANY, HENRY L. STE-
PHENSON, TALMADGE AND NEWMAN.

1. ASSIGNMENT. *Of tax certificate.* On a bill filed to set up a tax sale, where the records have been lost or destroyed, the certificate of sale given by the Tax Collector, transferred to J. M. Quinby, is no evidence of right in James A. Quinby & Co.
2. TAX CERTIFICATE. *Sufficiency of description.* A certificate of sale of "eleven tracts of land, containing 23,640 acres, lying in 13th district, White County, sold as the property of Assure Assure," does not sufficiently identify the land, so as to enable the Court to decree title.
3. LOST RECORD. *Proof of contents.* Where a Clerk of a Court, called to prove the contents of a lost record of condemnation of land for taxes, stated that his recollection was that the land was condemned; from the evidence found in the office, he thought the order of sale issued, and that the land was advertised; this was held to be insufficient proof of the contents of the record, to establish a sale.
4. TAX CERTIFICATE. *Act of 1844, c. 92, s. 1.* The Act of 1844, c. 92, s. 1, giving effect to a Sheriff's deed, does not operate to give any special force to a certificate of sale. Such certificate must be accompanied by proof of all the requirements to constitute a valid sale.
5. CHANCERY PLEADING. *Bill for title. Decree for taxes paid.* A bill for title to land sold for taxes, failing for want of proof of the regularity of the sale, a decree was rendered for taxes paid, with six per cent. interest.

Cases cited: *Tharp v. Hart*, 2 Sneed, 569; *Thacker, ex parte*, 3 Sneed, 346; *Henderson v. Staritt*, 4 Sneed, 470.

Statute cited: 1844, c. 92, ss. 1 and 3.

FROM WHITE.

Appeal from a decree of B. M. TILLMAN, Ch., in
Chancery at Sparta.

S. H. COLMS, for Quinby & Newman.

M. M. BRIEN, SR., for Newman.

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J. H. SAVAGE and T. B. MURRAY, for Talmadge and Stephenson.

FREEMAN, J., delivered the opinion of the Court.

The only matter before us, in this case, arises on a bill filed by Quinby & Co., in the nature of a cross bill, to set up a title to the land in controversy, claiming to have purchased the same at tax sales, or to be the assignee of others, who had purchased.

This bill alleges that defendant, Talmadge, had filed his bill in the Chancery Court at Sparta, in April, 1857, for a debt of \$1,444.48, with interest and costs, adjudged in his favor by the Supreme Court for the County and City of New York, and had obtained an attachment upon said bill, which had been levied on 38,961 acres of land, being the land in controversy in this case; that, in February, 1857, defendant, Stephenson, had filed his attachment bill for the recovery of an indebtedness due him, of \$2,665.26, and had obtained an attachment, which had been levied on this land. These bills were filed against the North American Coal and Transportation Company.

On the first of June, 1857, defendant, Newman, also filed his bill in the same Court, seeking to enforce a mortgage on these lands, and claiming priority over the attaching creditors.

These cases were ultimately prosecuted to decrees in the Chancery Court, from which decrees appeals were taken to the Supreme Court, where a decree was pronounced, reversing the Chancellor's decree as to the priority of these claimants, and remanding the cases to the

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Chancery Court, to be proceeded in under that decree; decreeing, however, that the land be sold.

Before the sale was effected, owing to delay arising out of the war, in March, 1866, complainant, Quinby & Co., obtained leave to file this bill against the complainants and the defendant in the first three bills mentioned, in which Quinby & Co. claim to have purchased the lands during the pendency of the litigation, at tax sales, and to have had an assignment from certain parties, who had purchased at another tax sale, of his certificate of purchase; that the records of the Circuit Courts of the counties of White and Cumberland, containing the proceedings under which said lands were condemned and ordered to be sold have been wholly lost or destroyed during the war, and no copies of the same, or returns of the officer, can be had or produced.

This bill alleges that the land was regularly ordered to be sold for taxes, and that, under said order, the complainants, Quinby & Co., purchased, and that they have, by such purchase, an equitable title to the land; and prays that the parties to the three bills be enjoined from selling the land under their decree, and that all the claim and title of the Transportation Company in and to said land be divested out of them and vested in "these complainants," that is, Quinby & Co., together with the legal title supposed to be in Newman.

The bill, however, in its statement of facts with reference to the title, shows that the lands were listed in the name of one *Assure Assure*, who had sold the land a number of years before to one of the Newmans, and

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that the land was listed in the county of White, for a railroad tax that had been voted in that county before the organization of the county of Cumberland, and in the county of Cumberland for the State and county taxes for the years for the taxes of which it was sold. It appears further, that the county of Cumberland was formed out of a portion of the territory of the county of White, and organized after the tax in favor of the railroad had been voted by the county of White.

This is a bill in the nature of an ejectment bill, based, it is true, on an equitable title, but still a proceeding in which the complainants, Quinby & Co., must show the better right in themselves before they can recover, or, rather, that they are entitled, as against these defendants, to call for the legal title, and have the same decreed to them, free from the charge of the decrees in favor of the defendants, to which we have referred.

The answer of the defendants, except Newman, deny all the material allegations of the bill. As to him, Newman, the bill is taken for confessed.

The first question presented for our consideration, is, has the complainant shown that these lands were ever ordered to be sold, by competent and legal evidence of the fact? If he fails in this, then the title which he claims must fail at the commencement.

As to the sale of the land in White County, we have only a receipt of C. R. Gamble, Railroad Tax Collector, in which he states that he had "received of William Bosson, William Clayton and Jo. Brown, one hundred and twenty-one dollars, the full amount of all railroad tax and costs on eleven tracts of land, containing twenty-three

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thousand, six hundred and forty acres, lying in 13th district, sold as the property of *Assure Assure*, for said taxes, and this day purchased at my sale by said Bosson, Clayton and Brown. July 5, 1858." This receipt is transferred, in consideration of \$141, to S. H. Colms, for J. M. Quinby, and the Tax Collector authorized to make a deed to him, August 12, 1858.

This receipt can be of no service to complainants, Quinby & Co., in making out a title to them, as it is not given to them, and is transferred to J. M. Quinby, not to James M. Quinby & Co.,¹ and we can not know that they are the same parties.

In the next place, it utterly fails to identify the land in controversy as the land sold by the said Gamble, by any sufficient description, giving only the number of acres, and stating it to be "in 13th district, and sold 'as the property of *Assure Assure*.'" This is clearly insufficient to furnish any muniment of title, on which the complainants can have a decree for the land described in the bill.

The deposition of Joseph Brown is taken, in order to prove the loss or destruction of the records of the Circuit Court of White County, and contents of the records, and that these lands were ordered to be sold. He simply proves that he was the Clerk of the Circuit Court of White County in 1858, and that Charles R. Gamble was the Railroad Tax Collector for the year 1857. He is then asked to state "if the lands of *Assure Assure* were sold for railroad tax for the year 1857, condemned, and an order of sale issued, and the lands advertised." He says,

¹See *Morean v. Saffarans*, 3 Sneed, 595.

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in reply to the above question: "My recollection is, the lands were condemned. From the evidence I find in the office, I think an order of sale issued, and the lands advertised." This is all the proof of the contents of the records of White County, and this shows that there is something to be found in the office, from which the witness has drawn his conclusion as to the facts stated. Whatever appears in the office, at least, should have been presented. We need take no time to discuss the sufficiency of this proof. It complies with no rule of law on the subject, and utterly fails to prove the contents of the records of said court.

We may here dismiss the case, so far as the claim of complainants depend on the purchase in White County, without investigating the question made before us in the argument, as to whether the land should have been listed for the railroad tax in White County, after the organization of Cumberland County.

We now examine the case, as to the sale made in Cumberland County for State and County taxes. It appears from the records of the Circuit Court of Cumberland County, that W. J. Reynolds, the Tax Collector for that county, reported to court the following lands as having been listed for taxes for the year 1858, and the taxes remain unpaid, etc. Then follows the description of the land:

"In District No. 2—Assure Assure, 23,660 acres; valued at \$6,000; taxes, \$26.40.

"W. R. REYNOLDS, Tax Collector."

Then follows a judgment of the Court, that the several tracts of land so reported for the non-payment of the

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taxes thereon, etc., be ordered to be sold, or so much thereof as shall be sufficient to satisfy the taxes and charges, etc., for the taxes due for the years 1856 and 1857.

The Clerk of the Court certifies that the above is a true and perfect transcript of the record, and of the proceedings had for the sale of the Assure Assure lands for taxes for the years 1856 and 1857, and that the above is all the record that can be found in his office in relation to said condemnation and sale. He then certifies: "I have made diligent search for the order of sale in my office, and said search has been ineffectual; said order of sale can not be found in my office. The above is a true and perfect record of all that can be found in my office, in relation to said proceedings, as appears of record or on file."

This, and the receipt of W. R. Reynolds, who was Tax Collector of Cumberland County, showing that he "received fifty-six dollars and fifty cents, in full for the taxes on the lands of Assure Assure, lying in Cumberland County, &c., for the year 1857; all of said lands being bought by S. H. Colms, at a sale of lands for taxes, at Crossville, 5th of July, 1858, at which time the said Quinby & Co., by their agent, was the highest bidder," is all the evidence of title presented by complainants to the lands in controversy. Can we decree a title to complainants on this state of the case?

The Act of 1844, c. 92, s. 1, Nicholson's Statutes, enacts, that, in all cases of sales of land heretofore made for public taxes, under the provisions of the laws now in force, it shall be sufficient, to make such sale valid and

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communicate good title to the purchaser, that the land so sold lies in the county in which it has been reported for non-payment of the taxes thereon; that it has been duly reported; that an order of sale has been awarded, and that the sale of said land was duly advertised; to establish which facts, the Sheriff's deed, reciting their existence, shall be *prima facie*, and all judgments and orders of sale shall be conclusive, unless the person wishing to show the irregularity of the same can prove that the taxes were duly paid before such judgment or order of sale was rendered.

Under this Act, it was held, in *Tharp v. Hart*, 2 Sneed, 569, that the plaintiff in ejectment, when the defendant set up a tax title, would not be permitted to show any irregularity in the sale or proceedings, unless he showed that he had first paid the taxes for the year for which the sale was made. In this case, however, the party seeking to set up the tax title had a deed from the Sheriff, under the order of sale. If we concede that this was the correct construction of this section, it can not aid complainants in this case, as they do not pretend to have any deed at all.

In the case of *Thacker, Trustee, &c., ex parte*, 3 Sneed, 346, the Court hold that the requirements of the third section of the Act of 1844, "that it shall be the duty of the Sheriff, in his report to court, besides stating that the land lies in the county, to state the civil district or districts in which said land lies, to whom granted, or in whose name entered, the quantity of acres as near as may be, *which shall be a sufficient description*; and no sale shall

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be avoided on account of any objection or informalities merely technical, but such sales shall be good and valid, if the foregoing requisites be substantially complied with, and the description contained in the Sheriff's report shall be given in the advertisement," should be complied with; and that, to "give validity to the proceedings, it is essential that its requirements should be conformed to." This was an appeal from the refusal of a Circuit Judge to condemn land, and order it to be sold for taxes.

In case of *Henderson et als. v. Starrett et als.*, 4 Sneed, 470, the Court held that the advertisement of the land for sale for taxes might be looked to, and attacked for not complying with the requirements of the statute, and go on to say, that the subsequent proceedings, after the judgment and order of sale, are not protected by the strict requirements of the last clause of the first section of the Act of 1844. The party in that case had the deed of the Tax Collector, and its recitals were held to be *prima facie* evidence of the facts recited, as to advertisement and sale, but no more.

We need review no more of our cases to see that the complainants present no valid, equitable title before us, on which they can ask a decree in their favor. They have no deed from the Tax Collector, or his successor in office, to make out a *prima facie* case in their favor of the regularity of the proceedings under which they claim, and of title in themselves. Not having this, he must then show that, up to the time of his purchase, all the requirements of the Act have been complied with; that is, that the land sold lies in the county in which it has been re-

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ported for non-payment of taxes; that it has been duly reported; that an order of sale has been awarded, and that said land was duly advertised.

The third section defines what shall constitute a due report of the land; that is, that it lies in the county; shall state the civil district in which it lies; to whom granted, or in whose name entered, and the quantity of acres, as near as may be.

No advertisement of this land is shown in this record. The report of the Tax Collector does not show the county in which the land lies, to whom granted, or in whose name entered.

For these defects in the title of complainants, we hold the tax sales under which they claim were absolutely void, and communicated no title, either legal or equitable.

It appears, however, in this case, that complainants paid taxes on said lands, not only for the years 1856 and 1857, but for a number of other years, subsequent; and as they have discharged a charge upon the land fixed by law, they are entitled to be reimbursed the sums so paid.

The decree of the Chancellor will be reversed; the injunction granted will be dissolved; the land will be sold by the Clerk of this Court, for payment of debts, in the order fixed by previous decree of the Supreme Court; and the Clerk will be directed to take an account of the payments made of taxes, and report the same to the present term of this Court, which will be allowed complainants, with six per cent. interest on the amount from the time paid, and said sum shall be allowed first out of the proceeds

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of the sale. The cross bill will be dismissed at complainant's cost in this Court, and in the Court below; the balance of the costs will be paid out of the fund arising from the sale.

DAVID FRY *et als.* v. JAMES BRITTON *et als.*

1. REVENUE COLLECTOR. *Judgment against.* A judgment rendered on motion against a Revenue Collector, and against a part of his living sureties only, is a nullity, and interposes no obstacle to a new proceeding.
2. THE STATE. *When a party. Sheriff. District Attorney.* A bill filed against the Sheriff and the District Attorney for the State, to enjoin them from collecting a judgment in favor of the State, does not make the State a party, and she can not prosecute a writ of error.

Code cited: 733, 735.

MOTION FOR WRIT OF ERROR.

This was a proceeding in the Criminal Court of Greene county, against David Fry as Tax Collector and his sureties, by motion. The regular Judge, A. W. HOWARD, being one of the sureties, vacated the bench, and a Judge was selected by consent. Thereupon, the Judge insisted that he had not vacated his place to have a judgment rendered against him, and the motion was dismissed as to him, and a judgment rendered against the Collector and the other sureties.

A bill was filed, making the Sheriff and District Attorney defendants, in which they were enjoined from

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collecting the judgment, but not asking to make the State a party.

Mr. Attorney-General¹ HEISKELL presented transcripts of these records in open court, and prayed writs of error to bring up the causes to the Court at Knoxville.

FREEMAN, J., delivered the opinion of the Court.

The Attorney General presents this record on behalf of the State, for a writ of error.

We are of opinion that the judgment which was enjoined by the bill filed in this case was an absolute nullity.

It is a judgment in a summary proceeding against a collector of public revenue, by motion.

By the Code, 733, a judgment may be rendered upon motion, "against the officer and his sureties for the amount appearing due to the State from the statement of the Comptroller."

By section 735, it is provided that if the delinquent or either of his sureties, has died before the motion is made, the Court shall give judgement against the sureties alone, in case of the death of the principal, or against the principal and surviving sureties on the bond, in case of the death of either of the sureties.

In this case, it clearly appears that the judgment is not rendered against all the sureties; and it not only does not appear that the surety against whom no judgment is rendered is dead, but on the contrary it appears that he is living, and the motion dismissed as against him.

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In a summary proceeding of this kind, the statute must be strictly followed. It is a proceeding in derogation of the common law, and can only be valid when it pursues the precise requirements of the law under which the proceeding is had. Such has been the uniform course of decision in this State.

This judgment being void, the fact that it was enjoined, even though the proceeding was or might have been unauthorized, can work no injury to the rights of the State. She may still have her remedy against the defaulting officer, and nothing in the record before us will interpose any bar to such proceeding, as the State may institute, to enforce whatever liability may have existed before the rendition of the supposed judgment, on motion against such officer and his sureties on his official bond.

On a subsequent day of the Term, FREEMAN, J., delivered the following opinion:

The record is filed in this case on the part of the State by the Attorney-General, asking a writ of error and reversal of a decree of the Chancery Court at Greeneville, enjoining a judgment obtained in the Circuit Court against David Fry and his sureties, on his bond as Revenue Collector of Greene County.

At a former day of the term, an opinion was delivered by the Court, holding that the judgment against the sureties was absolutely void.

We are now asked to review the decree of the Chancellor enjoining said judgment.

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On examination of the case, we hold that the decree enjoining the judgment can have no effect whatever, as against the State, for two reasons:

First. That by the Act of 1865, c. 36, p. 58 of Pamphlet Acts, the section of the Code, 2806, authorizing suits to be brought against the State, is repealed. Consequently, the suit could not have been properly brought against the State; the Court had no jurisdiction.

Second. The bill does not purport to be filed against the State, but only against James Britton the District Attorney, Howard the other surety, and the Sheriff. This does not make the State a party to the suit, even if the State could be sued in her own courts.

But inasmuch as the State is not a party to the case, she has no right to a writ of error to reverse a judgment to which she is not a party. The writ of error is, therefore, refused.

On application of the Attorney-General to put the order in this case on the minutes, it was held proper to indorse the order on the transcript only.

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JEPHTHA R. HOLCOMB v. JOHN C. CANADY.

1. CHANCERY JURISDICTION. *Filing answer, a waiver.* Filing an answer in Chancery is a waiver of objection to the jurisdiction of the court over the person of the defendant, as well as the subject matter of the bill.
2. CONVEYANCING. *Grant. Assignment of.* Assignment of a grant by indorsement and delivery is not a mode of conveyance known to our law, and does not transfer the title, legal or equitable, or give a right to a specific execution.
3. CHANCERY. *Bill for new trial. Merits.* A bill filed for a new trial of an action of ejectment, showed that the complainant claimed by defective *mesne* conveyances under the superior title; held to be sufficient merits.
4. SAME. *Same. Excuse for not making defense.* In the same bill, the excuse for not making defense held to be sufficient, was, that the case was reached and tried at the first term after the war, at which term the Court, after an interval of several years, was reorganized, the defendant being absent, and not represented by counsel, and being old and infirm, and living in another county, and social order not being restored.
5. SAME. *Same. Judgment by undue advantage.* To take judgment under the circumstances, was to obtain an undue and unconscientious advantage.
6. RECORD. *Entry construed in view of circumstances.* An entry in June, 1865, reciting that the "court being duly organized," in view of the state of things then existing, will be construed to mean, being then first reorganized after the war.

Cases cited: *Lowry v. Naff*, 4 Cold., 372; *Bennett v. Wilkins*, 5 Cold., 240; *Kirkman v. Snodgrass*, 3 Head, 372.

FROM DE KALB.

Appeal from a decree of the Chancery Court at Smithville, B. M. TILLMAN, Ch., presiding.

JOHN H. SAVAGE, for complainant, insisted that complainant was entitled to relief by *error coram nobis*: Code, 3110, 3116, 3118; 1 Swan, 341; Hist. of a L. S.,

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§§ 38, 71, 539, 542, 544; 4 Sneed, 432; 7 Hum., 39; 6 Hum., 332. Discovery and relief: 1 Story, § 65; 5 Hum., 554. Suit pending at law, no bar: 3 Hay., 213; 1 Ten., 169, 201; 1 Heis. Dig., § 385. Chancery will enjoin: Code, 3252; 11 Hum., 523; 5 Hay., 67, 78; 3 Yer., 366; 8 Hum., 710; 6 Yer., 167; 3 Hay., 127; Meigs' Dig., § 367; Hil. on New Trials, 425. Proof of excuse: 7 Hum., 39, 42; Hil. on N. T., 100; *Chase v. Brown*, 32 N. H., 130. On the merits: Cooke, 32, 137; 1 Tenn., 419; Meigs' Dig., p. 684-5-6; King's Dig., 3229, 3230. Same title in controversy in 2 Cold., 288. Demurrer not good, and waived: 5 Hum., 50; 3 Hum., 656; 7 Hum., 299.

M. M. BRIEN, Sr., for defendants, cited *White v. Cahal*, 2 Swan, 550; 7 Hum., 39; 8 Hum., 363, 372; 3 Hayw., 88, 92.

JAS. S. BARTON, with him, cited in addition, *Blount v. Garen*, 3 Hayw., 88, 92, on new trial. On the merits, *Barnes v. Sellars*, 2 Sneed, 33; *Parish v. Cummins*, 11 Hum., 297. On defense of the statute of limitations, *Graham v. Nelson*, 5 Hum., 605. Equitable title no defense at law: *Langford v. Love*, 3 Sneed, 308; *Crutsinger v. Catron*, 10 Hum., 24. On sales, what contract sufficient: *Sheid v. Stamps*, 2 Sneed, 172.

FREEMAN, J., delivered the opinion of the Court.

This is a bill filed to enjoin a judgment in an action of ejectment in favor of defendant, Canady, against complainant and a number of other defendants, rendered in

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the Circuit Court of DeKalb county, at June Term 1865, of said Court.

We need not state in this opinion the grounds set out in the bill as an excuse for not making the defense at law. The defendant in this case has precluded himself from making any objection to the jurisdiction of the Chancery Court, by failing to object at the proper time, either by way of demurrer or plea.

He has filed an answer, in which it is true he has inserted what he is pleased to call both a plea, and perhaps, a couple of demurrers; but they are such pleadings as no court having any regard to the rules of law or the forms of proceeding in such case, could take any notice of. As an illustration, after commencing his answer, as is usual, by proposing to answer so much of complainant's bill as he is advised it is material for him to answer, &c., he says, "and all such parts as are not specially responded to may be considered as specially demurred to." It would be an exceedingly liberal court, to say the least of it, that could treat this as having the effect of a demurrer. We need not notice the other equally informal efforts at objection to the jurisdiction in this case. It is now well settled, both by our immediate predecessors in this Court, and by other decisions of this Court, made many years ago, that the filing of an answer is a waiver of objection to the jurisdiction of the Court of Chancery over the persons, as well as the subject matter of the bill, even though it might be a matter of legal cognizance, which if taken advantage of by plea or demurrer, would be a fatal objection. See *Lowry v. Naff*, 4 Cold., 372; *Bennett v.*

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Wilkins, 5 Cold., 240; *Kirkman v. Snodgrass*, 3 Head, 372 The question, then, presented is, what relief if any can we give the complainant, under the facts stated in his bill and the proof in the case.

The bill is based, to a large extent, on the idea of obtaining a delivery of the grant which Canady, the defendant has in possession, and a divestiture of title of said Canady to the land, as consequent upon said delivery. It claims that complainant had purchased the grant of Canady, and taken an assignment of the grant, on the back of the paper, to himself, and is thereby made "equitable owner of the grant." The bill then asks that the suit at law (what suit does not very distinctly appear,) be enjoined, and that the title of Canady under his grant be divested and vested in complainant, in accordance with said assignment. It needs no argument or authority to see at once that this can not be done. The law of Tennessee has at all times, prescribed the mode of conveyance of land, by deed, and the policy of our registration laws requires them to be registered. The purchase and assignment of the grant could, at most, have only given a right to the paper itself; but on no principle could it have operated as a conveyance of the land, nor could it have created any equitable right to or charge upon the same.

The next prayer of the bill is, that this Court assume jurisdiction of all the matters in dispute, and render such decree as the facts and good conscience may require, and for all other relief, &c.

We can, under the prayer for general relief, look to

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the case made out by the bill and proof, and give such relief as the law permits.

We can not see, from the title exhibited, that complainant has a perfect legal title to the land in controversy. On the contrary, we can see, from the paper title he presents, that on the face of it he has not the legal title in himself to a part of the land, nor has he conveyed it to his vendees. We need not point out the defects in that title in this opinion. He, however, insists that he can make out a title under the statute of limitations, and there is proof in the record tending to support this view of the case, and he may be able to sustain this plea on another trial fairly had.

We can see, however, clearly, that the defendant, Canady, has not a title on which he could recover in a court of law, in ejectment, and that he was not entitled to a recovery in the ejectment suit in which he obtained the judgment in 1865, against complainant, and his tenants, perhaps, or vendees holding under title bonds.

The land was granted to one Thompson Newby, as assignee of Theodoric Burton, on the 2nd day of October, 1841, and the grant was based on a special entry, made by said Burton, 30th April, 1830. Canady claims title under an entry made on 27th of September, 1837, and a grant issued to him 6th of August, 1840. It is seen from this statement, that the Newby grant is the younger grant, but is based on the older entry; so that, by a long train of decisions in this State, Newby's title is the better one, and Canady could not recover the land under his grant, if the defendant in ejectment shou

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interpose the Newby grant and entry as a defense, unless he should show that he had obtained a title under said grant. This he does not pretend to have done, but distinctly claims his title to be under his grant. We can, therefore, see clearly that the verdict and judgment in ejectment are unjust and contrary to law. This being so, the complainant, having been the real or material party to said suit at law, is entitled to have it set aside, if he brings himself fairly within the rules laid down for granting such relief.

The record of the judgment in the Circuit Court shows that, while the case was regularly reached on the docket, yet it was tried *ex parte*; that neither the defendants nor their attorneys in that case were present, nor did any one appear for them. The caption of the record, which is a very imperfect one, from the Circuit Court of DeKalb, after reciting the date of the term of the Court to be June, 1865, adds: "Court being duly organized, the following proceedings were had." We know judicially, as a part of the history of the country, that the entire legal machinery of the State had for several years been disorganized, and the courts had not been held. We also know that in the Spring and Summer of 1865 they were reorganized, and the machinery of the State Government again put in operation. We are bound, therefore, in the light of these facts, to construe this entry to mean that this Court was but for the first time organized after the war, at the term at which the trial was had.

The proof shows that complainant was at the time an old and infirm man, living in another county; that the country was in an unsettled state, confidence not yet re-

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stored, nor social order established on the basis of civil law, but that the military were stationed in the town of Smithville, for the purpose, as we may fairly assume, of keeping order, or aiding or protecting the court then being held. Taking all these things into consideration, we think an undue and unconscientious advantage has been obtained over the complainant, by which a recovery has been had in the ejectment case, which it would be inequitable and unjust to enforce.

The complainant in the ejectment suit evidently took advantage of the peculiar state of the country, the absence of defendant and his counsel, to have a trial, where all the chances were in his favor, and where the defendants were not even heard to contest his claim. If he has, as claimed in his answer, the superior title, he can easily maintain his right on another trial in the Circuit Court. If he has not the title, then he ought not to hold 1,300 acres of land, under a judgment thus unfairly and unconscientiously obtained.

We, therefore, reverse the decree of the Chancellor dismissing complainant's bill, and direct a decree here, setting aside the judgment at June Term, 1865, of DeKalb Circuit Court, and ordering a new trial of said cause in said Court.

Each party will pay half the costs of this bill, both in the Court below and in this Court.

David S. English v. Peter Turney *et al.*

DAVID S. ENGLISH v. PETER TURNEY *et al.*

1. "Good, current bank notes," are bank notes which circulate currently as money. In the absence of proof, they are presumed to be at par, but subject to proof of their real value.
2. Upon a note executed after the Act of Congress for the issue of legal tender notes, the standard of comparison by which bank notes are to be estimated is legal tender notes, not gold and silver.

FROM WHITE.

Appeal from a judgment of the Circuit Court, W.
W. GOODPASTURE, J.

Some of the proof showed that at the time the note fell due, Tennessee Bank notes were about of equal value with Treasury notes, while gold was worth 165 to 170.

The plaintiff's note was for \$572, executed by Turney, due April 4, 1863. Judgment January 24, 1867, for \$347, debt, and \$79.23, damages. The plaintiff excepted and appealed.

J. D. GOODPASTURE, for the plaintiff.

DEADERICK, J., delivered the opinion of the Court.

Suit was brought in the Circuit Court of White County, upon a note of defendants to plaintiff, executed 4th of April, 1863, and payable one day after date, "in good, current State Bank notes."

The Court below charged the jury that "good, current bank notes," were bank notes "which circulate currently as money, and which, in the absence of proof

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to the contrary, are presumed to be of value equal to money, but the defendants may introduce proof to show that they are of less value." In this we think there is no error. The instructions of the Court are in substantial conformity to the repeated holdings of this Court.

Proof was introduced to show the relative value of "good, current State Bank notes," gold and silver, and United States Treasury notes, commonly called "greenbacks."

The Circuit Judge further instructed the jury that the plaintiff was only entitled to recover the value of "good, current bank notes" at the time the note fell due, and that gold and silver is the standard to be governed by in fixing the value of the bank notes."

So much of the foregoing instruction as required the jury to measure the value of the bank notes by the gold or silver standard, is erroneous. The note was executed after the passage of the Act of Congress making United States Treasury notes a legal tender. Judgments upon such notes are payable in such Treasury notes, and the plaintiff in this case would be bound to receive them in satisfaction of his judgment. The standard of value thereof should be the currency or money which the plaintiff would be bound to receive in satisfaction of his judgment.

Let the judgment be reversed, and remanded for a new trial.

Kinnard & Cooke v. Ensley Wilmore.

KINNARD & COOKE v. ENSLEY WILLMORE.

1. SHERIFF. *Negligence.* A Sheriff, who gives his receipt for the collection of a debt, becomes an agent for the collection, and is bound to use reasonable diligence. If, in consequence of negligence in obtaining judgment and execution in a reasonable time, the debt is lost, he is personally responsib'e.
2. EVIDENCE. *On former trial.* To prove the testimony of a deceased witness on a former trial, a witness is not competent, who states that he does not remember that the deceased was examined on the former trial, but he remembers that he heard all the evidence in that trial, and if he was examined, he heard him; that he was examined in another cause, and he remembers his testimony in that cause, and that if he was examined on the former trial, his testimony did not vary from his testimony in the other cause. Nor can he be heard, after proof *aliunde*, that the deceased was examined on the former trial.

FROM JACKSON.

Appeal from the Circuit Court, A. McCLAIN, J., presiding.

COX, DEWITT & QUARLES, for plaintiffs, cited *Trigg v. McDonald*, 2 Hum., 386; *Raines v. Childress*, Ib., 449; Code, 4093.

H. DENTON, with them.

JOHN P. MURRAY, for defendant.

DEADERICK, J., delivered the opinion of the Court.

The plaintiffs, as partners, brought suit in Jackson County Circuit Court, against the defendant, who was former Sheriff of said county.

The first count in the declaration alleges that defend-

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ant, as Sheriff of Jackson County, received of plaintiffs, for collection, certain notes, describing them, which. he promised to collect and pay over to plaintiffs, and although often requested so to do, he has hitherto wholly failed to pay, etc. The second count, which was filed upon leave granted to amend the declaration, alleges that defendant, being Sheriff of Jackson County, received into his hands for collection, of plaintiffs, the following notes, (enumerating and describing them,) and that said defendant, as the agent of plaintiffs, promised and agreed to use reasonable diligence in and about the collection of said several notes and sums of money, and when collected, he would pay over and account for the same to the plaintiffs. Then follows an averment of the breach of these several agreements and undertakings.

To the declaration, several pleas are put in: 1st, Denying the agency and undertakings; 2nd, That his agency was revoked by the appointment of another agent; 3rd, Performance of his undertaking; 4th, Statute of limitations of six years.

Upon the trial of the cause, the plaintiffs read the receipt of defendant, signed as Sheriff, which recited that he had "received of James W. Draper, as agent of Kinnard & Cooke, the following notes, for collection, executed to Kinnard & Cooke." Then follows a list of the notes set out and described in the plaintiff's declaration. The jury returned a verdict for defendant, and the Court refusing to grant a new trial, the plaintiffs appealed in error to this Court.

Upon the trial, it was proved that on several of the notes judgments were obtained in due time. Upon one

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judgment no return was made of the execution, which came to plaintiff's hands; and upon another judgment execution was returned with an insufficient return. In several other cases it was proved that the parties as to whom no returns or insufficient returns of executions were made, were solvent, and remained so for several years, and subsequently became insolvent. No testimony in contradiction of these facts was adduced.

The defendant offered to prove by James W. Draper the testimony given by one McKinney on a former trial of this case, the said McKinney having died since said trial. Draper stated that he had no recollection of McKinney's having been examined as a witness in this case, but that he was examined in the trial of a cause between himself and defendant; but if he was examined as a witness upon the former trial of this case, his statement did not vary from what he said on the trial between himself and defendant; that he was present at the former trial of this cause, and heard the testimony on the trial, but did not remember that the deceased witness was then examined. It was proved by another witness that McKinney was examined in this case, and witness, Draper, was then allowed to state what he, McKinney, had said in the trial between Draper and defendant. To this plaintiffs excepted.

This testimony was improperly admitted. The testimony of McKinney, which Draper details, was given in the suit of Draper against defendant, and was held admissible by his Honor, the Circuit Judge, upon the ground that Draper stated that if McKinney was examined in the former trial of this case, his testimony did

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not vary from that given in the case of Draper against defendant. But Draper distinctly states that he does not remember, even, that McKinney was ever examined in this case, and, of course, he can not recollect what he stated upon his examination. This does not fulfill the requirement of the law. The testimony of a deceased witness must be proved by a witness who will swear from his own memory, or by notes taken by a person who will swear to their accuracy. 1 Gr., § 166.

His Honor, the Circuit Judge, charged the jury that, "you will not find against the defendant, unless the debtors are dead and their estates insolvent, or hopelessly insolvent, if living, even where it may appear that there has been want of reasonable diligence." This charge is too strong against the plaintiffs. A Sheriff who gives his receipt for the collection of a debt, becomes the agent for the collection of that debt, and is bound to use reasonable diligence. He must obtain a judgment and execution thereon within a reasonable time, and if he neglects to do so, and the debt is lost in consequence of the neglect, he is personally responsible, whether the loss be occasioned by the insolvency of the debtor, his removal from the country, or other cause.

For these errors the judgment of the Circuit Court will be reversed, and the cause remanded for a new trial.

L. D. and Charles Hickerson v. James Price.

L. D. and CHARLES HICKERSON v. JAMES PRICE.

1. SURETIES. *Release of.* Proceedings for the release of sureties are summary in their character, and are not to be extended by construction to embrace cases not provided for by the statutes.
2. RECORD. *What must appear.* Every fact necessary to authorize the Court to act, must appear by the record.
3. NEW BONDS. *When to be given.* No provision is made by law for the release of sureties of an officer, by giving new bonds, at the instance of the officer himself. He may give a new bond, on application of a surety, without notice.
4. The record showed a new bond given by a Clerk and Master on his own application. At the next term a surety gave notice, and an entry was made, stating that the former application was made because the Clerk had been informed that the surety desired to be released, wherefore the Court declared that the surety had been released before, and refused the present application. Held, that the surety was not released.

FROM COFFEE.

Appeal by sureties from an order of the Chancery Court at Manchester, declaring them to have been released by previous action of the Court, and refusal then to require a new bond.

JORDAN STOKES, for complainants, insisted that the release of sureties is summary, citing *McGhee v. Anderson*, 11 Hum., 595; *Wynne v. Edwards*, 7 Hum., 418. On taking bond, the power of the Chancellor is exhausted, until one of the contingencies provided by statute gives him new power. Until then any action was *coram non judice*, and whatever may be the liability of the new sureties, does not relieve the old. That the information of Price, derived from others, does not make the case of

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“public or private application” of a surety. If a case within the statute existed in fact, the record does not show it. The Court ought, therefore, to have allowed the application.

ATTORNEY-GENERAL HEISKELL, for the State, cited the Code, 783, 785, 790, and insisted that there was error in the action of the Court, but that the sureties could not be released, except from the time a new bond was executed and approved, § 790. The record shows that the act of the Clerk at August Term was voluntary, and not on “application” of any surety. The character of the new bonds was fixed by the record then made, not by entries of the next term, of facts, until then, *in pais*. Such entry could not affect them by relation, nor could it operate from the time of the entry. If the Hickersons had applied in August, they would not have moved the matter in September. But it is enough that the record does not show such application. The bonds being “additional,” proves nothing. Additional bonds are provided for in Arts. 4 and 5. The law will favor an increase, not a diminution of security.

DEADERICK, J., delivered the opinion of the Court.

Complainants, with others, became sureties upon the official bonds of defendant, in August, 1865, upon his appointment as Clerk and Master of the Chancery Court at Manchester. At the August Term, 1868, of said Chancery Court, the following entry appears to have been made:

“This day, James Price, C. & M., came into open

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court, and upon his own application, asked leave of the Court to give new bonds, with other securities, which the Court permitted him to do. Whereupon the said James Price presented the following bonds, which, having been acknowledged before, and certified and approved by, the Court, were ordered to be spread upon the minutes, to-wit." Then follow the several bonds, required to be executed by law, by the Clerk and Master, and the new sureties.

No order discharging complainants and their co-sureties was made at this term of the Court.

On the 6th of November, 1868, the complainants gave defendant notice that they would apply to be discharged from their suretyship upon his official bonds, on the 12th of November, 1868, at the special term of the Chancery Court then to be held, and entered a motion to be discharged at the time specified in the notice.

On the 14th of November, two days after the motion was entered, the Court, upon argument of counsel, decreed as follows: "That the defendant, James Price, at the August Term, 1868, asked leave of the Court to give new bonds, with other securities, which leave was granted; the said Clerk and Master having, at some previous day, just before or about the beginning of the term, stated to the Chancellor that he had been informed privately that the said Hickersons, two of his securities upon his former bonds, desired him to give new bonds, as they did not desire to be longer bound as his securities, and that therefore he wished to give new bonds; and this last fact being known to the Chancellor, though not entered on the minutes, and the Court being further satisfied that

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said new bonds, thus given on the 13th day of August, 1868, were regularly and legally executed and acknowledged and received by the Court, and the Court being of opinion that the notice subsequently given by the complainants, and their motion thereunder before the Court, is unnecessary, and can effect no more than was accomplished by the new bonds already executed by said Clerk and Master and sureties, and approved by the Court, declines, under the notice and motion of said Hickersons, to make any further order on the Clerk and Master as to bonds, and dismisses the motion at the costs of complainants." From this order or decree the complainants appeal.

The question presented for our determination is, did the execution of the new bonds at August Term, 1868 exonerate the complainants from all further liability upon the bond which they had theretofore executed as sureties of defendant? If so, their motion was properly dismissed; if not, they were entitled, to be discharged by the execution of a new bond by their principal, or upon his failure to give such new bond, to have the office declared vacant and a new appointment made.

Proceedings, under our statutes, for the release of sureties upon official bonds, are summary in their character, and are not to be extended by construction, so as to embrace cases not provided for by statute. The cases in which public officers may be required to give new bonds are specified in section 778 of Code, and in section 785. This last named section provides for the release of the sureties of an officer by giving notice in writing.

The proceedings of the Chancery Court, in the taking

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of the new bond in this case, was, in the opinion of the Chancellor, sustained by section 788 of the Code. That section provides: "When any officer consents, in any case, upon public or private application of any of his sureties, to give a new bond, it may be taken without further proceedings, with the same effect as if executed upon order." The proper construction of this section is, that the application of the sureties is to be made by them to the Court; and this being a summary proceeding, every fact necessary, under the statutes, to confer jurisdiction upon the Court, should be recited in the decree or judgment accepting the new and exonerating the original sureties.

The proceedings of the August Term, 1868, as transcribed in this record, simply show that defendant, Price, upon his own application, was allowed to give bond, with new sureties, without showing any reason for the application. The statutes nowhere confer authority upon the Chancellor to take new bond and security in such a case. And even if we could look to the recitals of the subsequent decree dismissing the plaintiff's motion in this case, (which is a different case from that in which the new bond was taken,) these recitals do not fall within the provisions, or fulfill the requirements of section 788 of the Code. The recitals of that decree are, that the said Clerk and Master had, before or at the beginning of the term, informed the Chancellor that he, the Clerk and Master, had been informed privately that the said Hickersons desired to be released.

The application is thus shown to have been made to

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the Court by the defendant, Price, and not by the sureties, as contemplated by the statute.

It follows, therefore, that there was no authority conferred by the statute upon the Chancellor, to take the new bond, and that the complainants were not released, as sureties, thereby.

The decree of the Chancellor will be reversed, and the cause remanded to be proceeded in, in conformity to this opinion.

The decree was entered as follows:

This cause coming on to be heard, on the transcript of the record from the Chancery Court at Manchester, and the same being inspected, and argument of counsel heard, because it appears that there is manifest error in the record, the action of the Court below is reversed. And it appearing to the Court that the said appellants were entitled, on their application, to an order upon the said James Price, compelling him to give additional bonds, pursuant to the notice of the appellants, and that there was not, by reason of the alleged facts stated by the Chancellor in the record, any valid grounds for refusing to make said order, it is therefore ordered and adjudged that the said James Price shall, within the first three days of the next term of said Court, execute bonds, as required by law, in addition to the bonds heretofore given by the said James Price; and that, from and after the execution of the said bonds, and the acceptance and approval thereof by the Court, the said appellants will be,

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by operation of law, released from all liability for any act of the said Price, which may happen or be performed after the acceptance thereof. On failure of the said James Price to give such bond, within the time prescribed, to the satisfaction of the Chancellor, the office of said Price, as Clerk and Master, shall be immediately declared vacant by such Court, and a new Clerk and Master be appointed.

LOGAN H. MCCARVER v. JOHN JENKINS.

1. APPEAL FROM A J. P. *Bond, evidence of.* An appeal bond returned to court with the papers, is *prima facie* evidence that the appeal was prayed and granted.
2. SAME. *Bond before appeal. Provision directory.* The provision, Code, 3141, that the bond shall be executed before the appeal is granted, is directory.
3. SAME. *Amendment.* A Justice, having been examined, proved that he granted an appeal on the day of the judgment, and delivered a draft of an appeal bond to the appellant on that day and of that date, which defendant afterwards delivered to him executed, not on the day it bore date, but after the expiration of the two days allowed by law for appeal. Appellant moved to allow the Justice to amend, so as to show that he did grant the appeal; this being refused, it was held to be error.

Cases cited: *Gilbert v. Driver*, 3 Head, 463; *Malister v. Scrice*, 7 Yer., 277; *Bayley v. Hazard*, 3 Yer., 487; *Lawler v. Howard*, Meigs, 15.

Code cited: 2875, 4132, 4177, 4178.

Code construed: 3141.

FROM JACKSON.

JOHN P. MURRAY, for plaintiff, cited *King v. Booker*, 1 Heis., 11; and *Gilbert v. Driver*, 3 Head, 463.

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H. DENTON, for defendant.

SNEED, J., delivered the opinion of the Court.

In an action of replevin before a Justice of the county of Jackson, there was judgment against the defendant, and the case was taken by appeal into the Circuit Court. The proceedings before the Justice do not show that an appeal was prayed and granted; but an appeal bond was filed, dated of the day of the judgment before the Justice. When the case was called in the Circuit Court, the plaintiff moved to dismiss the appeal, because the appeal bond was not, in fact, executed within the two first days after the judgment was rendered, and because it does not otherwise appear that an appeal was prayed and granted. In support of this motion, the plaintiff introduced the Justice who rendered the judgment, and was permitted to prove, over the defendant's objection, that the appeal was prayed and granted on the day of the trial, Monday, the 26th of October, 1868; and he gave him, the defendant, the form of the appeal bond, which the defendant brought back executed, and delivered to him on the Saturday following. The defendant asked leave of the Court to allow the Justice to amend the pleadings, so as to show that the appeal was regularly prayed and granted at the proper time. This motion the Court disallowed, and gave judgment dismissing the appeal, and awarding a *procedendo* to the Justice.

The judgment of the Circuit Court was erroneous. The fact appears that the appeal was, in fact, prayed and granted; and the Justice should have been permitted to

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amend so as to show the fact. It does not affirmatively appear that the bond was not executed in time. Upon the face of the bond it appears that it was executed on the day of the rendition of the judgment; but the parol proof shows that it was not filed within the time prescribed by law. The presumption of the law would be, that the bond was executed on the day it purports to be; and the fact appears that it was actually accepted and filed by the Justice. We think this practice is rather technical to be applied to the proceedings before Justices. This very question, whether, after the appeal is prayed and granted, the Justice might allow the bond to be given after the two days allowed for appealing had elapsed, was reserved by Judge McKinney in *Gilbert v. Driver*, 3 Head, 463; and the intimation is, that it might be done. We are unaware, however, of any definite adjudication upon the question. The most liberal intendment is allowed, and indeed prescribed by our law, in favor of the regularity of all proceedings before Justices. A substantial compliance with the requirements of the law is sufficient to render the proceedings before this tribunal valid for all purposes, so far as the parties litigant are concerned, and all persons claiming under them: Code, 4132. The Code provides, in emphatic terms, that no civil case originating before a Justice, and carried to a higher court, shall be dismissed by such court for any formality whatever, but shall be tried on its merits, and the court shall allow all amendments necessary to reach the merits: Code, 4177. The important inquiry is, was an appeal prayed and granted? The bond returned to the Circuit Court with the papers is

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prima facie evidence that an appeal was prayed and granted; but this presumption may be rebutted by proof that an appeal was not prayed and obtained within the time allowed by law: Sec. 4178. It has often been held by this Court, that an appeal prayed and granted after the two days, would be dismissed; that, after the expiration of the two days, the Justice has no jurisdiction to grant an appeal. But we apprehend it has never been determined, in reference to proceedings before a Justice, that when the appeal was really prayed and granted within the time, it would be fatal to the appeal if the bond happened to be executed afterwards. The Code requires the Circuit Court, in appeals from Justices, to supply any defect in the proceedings of the inferior jurisdiction, as though the suit had been commenced in the Circuit Court: Sec. 2875. This would unquestionably authorize the Court, when it appeared that the appeal had been prayed and granted within the time, if the bond was informal or irregular, to have the same amended and perfected, rather than dismiss the appeal. It is true that it is provided, that before the appeal is granted, the person appealing shall give bond, with good security, for the prosecution of the appeal: Sec. 3141. But this provision is directory to the Justice, and does not deprive him of the right to exercise a sound discretion in the matter. A substantial compliance is all that is necessary. Many cases might occur where, after appeal prayed, the absence of the security might demand an indulgence of a few days in executing the bond. In such a case, it would be a harsh rule that, after appeal prayed, it should be defeated by a technical observance of the let-

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ter of the law. We know that, in appeals from the Chancery Courts to this Court, which are required to be granted upon bond and security, during term time, it is the common practice to allow the bonds to be executed after the adjournment of the court. We are not disposed to prescribe a harsher rule to these domestic tribunals, whose irregularities of proceeding the law regards with the utmost indulgence. The sole object of the appeal bond is to secure the successful party in his debt or his costs, or both, as the case may be. It has this virtue, if it be a good common law bond, whether it be taken in exact conformity to the statute or not. Before the liberal provisions of the Code, it was held that an appeal bond executed after the time for appeal had elapsed, was a nullity: *McAlister v. Scrice*, 7 Yer., 277; *Bayley v. Hazard*, 3 Yer., 487. But these decisions have reference to proceedings in the old County Court. As we have already observed, the practice of permitting bonds to be executed for appeals from courts of record, out of term time, has long been sanctioned by this Court; and we are not permitted to ignore the liberal provisions of our statutes, when a like rule is sought to be applied to the proceedings before a Justice. The Court, in this case, should have permitted the Justice to amend, that it might be shown that the appeal was prayed and granted: *Lawler v. Howard*, Megis' Rep., 15. This fact appearing, the bond, accepted and filed after the appeal was granted, was not fatal to the appeal. If defective or irregular, the proper practice would have been to have amended or perfected it: Code, 2875. While it is safest and best for the Justice in all cases to conform

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to the exact requirements of the statute, yet a substantial compliance is all that the law demands of him. We hold, therefore, that when it appears that an appeal was prayed and granted from the judgment of a Justice of the Peace, within the time prescribed by law, the mere fact that the appeal bond was executed afterward, if accepted and filed by the Justice, will not vitiate the appeal.

The judgment is reversed, and the cause remanded for trial upon its merits.

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APPEAL. *In forma pauperis.* Time to take oath. Time beyond the term may be allowed by the Chancery Court, to an appellant, to take the oath of a pauper, upon an appeal prayed and granted to the Supreme Court.

Cases cited: *Phillips v. Rudle*, 1 Yer., 121; *Herd v. Dew*, 9 Hum., 365; *Barber v. Denning*, 4 Sneed, 267; *McPhatridge v. Gregg*, 4 Cold., 326; *McAlister v. Scrice*, 7 Yer., 278; *Morris v. Smith*, 11 Hum., 135; *Davis v. Dyer*, 5 Sneed, 680; *White v. Henderson*, 1 Heis. Dig., 152; *Brown v. Brown*, Ib.; *Tedder v. Odum*, ante, 50; *Gillespie v. Goddard*, 1 Heis., 777.

Statutes cited: 1821, c. 22, s. 2; 1807, c. 19; 11 Hen., 7, c. 12.

Code cited: 313, 3161, 3194, 3195, 4516, 4793.

MOTION TO DISMISS APPEAL.

J. B. LUSTER, for the motion, cited *Hale v. Parmley*, MS., Heis. Dig., —; *Morris v. Smith*, 11 Hum., 135;

¹See S. C., decided on merits, 3 Heis.—February 18, 1871.

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White v. Henderson, 1 Heis. Dig., 152; *Brown v. Borwn*, Ib.; *Davis v. Dyer*, 5 Sneed, 679.

S. M. FITE, against the motion, cited Code, 3180, 3192, 3194; *Dudley v. Balch*, 4 Hay., 193; *Brumley v. Hayworth*, 3 Yer., 421; *Phillips v. Rudle*, 1 Yer., 121; Act of Henry VII; 1821, c. 21; *Davis v. Dyer*, 5 Sneed, 679; 11 Hum., 133; 2 Sneed, 711; 1 Sneed, 42; *Tedder v. Odum*, ante, 50; Code, 2864, 2867, 3477. Proposed to give bond now, and cited *Morris v. Smith*, 11 Hum., 135. Insisted that the motion came too late: *Gillespie v. Goddard*, 1 Heis., 777; *Tedder v. Odum*, ante, 50; *Hodge v. Dillon*, Cooke, 279; *Nance v. Hicks*, 1 Head, 624; Code, 4514.

SNEED, J., delivered the opinion of the Court.

In this cause, tried and determined in the Chancery Court at Carthage, at a special term, held on the fourth Monday in October, 1868, Dilly Page, a colored woman, prayed an appeal to this Court, which was granted, upon condition that she give bond according to law, or take the oath prescribed for poor persons, on or before the 15th day of November next ensuing. On the 12th day of November thereafter, she appeared before the Deputy Clerk and Master of said Court, and took the pauper oath, and the transcript of the record in said cause was filed in this Court on the 16th day of November thereafter. Now, at the December Term, 1870, of this Court, the complainant moves to strike the cause from the docket, because said pauper oath was taken out of term time, and before the Deputy Clerk and Master.

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The question whether this Court can entertain a cause brought here by appeal *in forma pauperis*, when the oath is taken out of term time, is not free from difficulty, on account of the obscurity with which conflicting decisions have invested it.

It is upon no specific statute of our own, but upon the construction, by the English Courts, of the statute of 11 Hen., 7, c. 12, which has been adopted here and applied to our own State, that appeals *in forma pauperis* are granted at all. *Phillips v. Rudle*, 1 Yer., 121; *Herd v. Dew*, 9 Hum., 365.

In the first case cited, the Circuit Court had permitted the defendant to take the oath prescribed by the Act of 1821, c. 22, s. 2, that he was not able to bear the expenses of the law suit he was about to carry up to the Supreme Court, and that he was justly entitled to the relief against the judgment. It was contended that the Act of 1821, c. 22, only applied to plaintiffs beginning a suit by original writ, but, at furthest, would only excuse the giving of a prosecution bond for costs under the Act of 1807, c. 19, ss. 1 and 2, and that the same would not extend to the suing out of writs of error, which required security before being granted. In that case it was said by Judge Whyte, that the statute of 11 Hen., 7, c. 12, was more copious in expression than ours, but not more comprehensive in its scope and effect. It was enacted for the reasons stated in the preamble, that the King willeth and intendeth indifferent justice to be administered, according to his common laws, to the poor as to the rich. Upon the construction of that statute, the Lord Chancellor pronounced it a very singu-

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lar proposition that a pauper could not appeal. He could not see why, because a party was poor, the Court could not set itself right. *Bland v. Lamb*, 2 Jac. & Walk., 402.

It cannot be denied that the rigor of judicial ruling in this State, upon this subject, has, in many cases, amounted to a denial of public justice to the poor. A litigant, who honestly believes he has merits in his cause, wishes to have his rights adjudicated in a court of last resort. He is told that he must give bond and security for the costs, and often for the amount of the judgment itself, before he can be allowed that privilege, or he must take the oath prescribed for the poor. With a natural repugnance to the latter alternative, he asks time to counsel with his neighbors, and try to produce the required bond. The Court graciously gives him time to give the bond or take the oath, and designates a day in vacation for that purpose. He finds that he can not give the required bond, and is obliged to take the pauper oath. He pursues the course the Court itself has prescribed for him, and goes before the Clerk in vacation, and takes the oath. The affidavit is made a part of the record, and when presented here, his cause is summarily dismissed, because his affidavit was made before the Clerk, out of term time. It seems to us that such a practice works an inexcusable hardship, and is one of those reproaches upon the law which courts of justice should make haste to correct. And, in the absence of any positive statute upon the subject, we are led to inquire whether such a harsh decision can fairly be deduced from the principles of the common law. It may be conceded that the granting of

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an appeal, and the taking of a bond, or the administration of the oath *in forma pauperis*, is a judicial act, but yet the Court has no discretion whether to grant or refuse an appeal from its final judgments, upon conformity by the appellant to the conditions prescribed by law. But the object of the law, this Court has said, as to actions *in forma pauperis*, was to place the weak on a level with the strong, in a contest for their rights in the courts of justice. *Barber v. Denning*, 4 Sneed, 267.

It has constantly been the practice of this Court to entertain appeals, upon bonds given before the Clerk and Master, and out of term time, under the orders of the Court. This practice has been reprehended. But it is said to have been too long sanctioned by usage to be changed now, and it can not be extended by judicial construction to embrace appeals prosecuted under the poor laws. *McPhatridge et al. v. Gregg et al.*, 4 Cold., 326. This discrimination is unsatisfactory, and if the object of the law be "to place the weak on a level with the strong in a contest for their rights," we are led to demand a reason for it. Upon what principle is it that an appeal can be entertained here upon a bond taken under the orders of the Court, out of term time? Because it is a *quasi* judicial act, done under the order and sanction of the Court. Is not the oath *in forma pauperis*, taken by the Clerk and Master out of term time, and under the sanction and orders of the Court, just as much a judicial act as the other? This certainly seems a distinction without a difference. The Clerk and Master, as the agent of the Court, is presumed, in taking the bond, to know what he is doing, and knows that a good bond is required.

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He is presumed to know, also, the effect of the oath *in forma pauperis*; and in either case, he has a direct personal interest in seeing to it that the law be not abused.

If the oath be false, there is a remedy for the party injured. This, say the Court, and the criminal responsibility which the party incurs by falsely taking the pauper oath, was deemed a sufficient security against the abuse of the law. *Morris v. Smith*, 11 Hum., 135. An indictment for perjury may be predicated upon such an oath falsely and corruptly taken. Any person who willfully and corruptly swears or affirms falsely, in any material matter, upon *any oath or affirmation required or authorized by law*, is guilty of perjury. Code, 4793.

A proceeding before one in any way entrusted with the administration of justice, in respect of any matter regularly before him, is considered judicial for this purpose. 2 Russ. on Cr., 518; Hawk. P. C., c. 69, s. 3; 3 Yeates (Penn.), 414; 9 Pet., 238; 2 Bouv. L. D., 324. There are many acts which Clerks and Masters are required to do out of Court, which are not less judicial proceedings because they are done out of term time. Their duties in such matters are partly ministerial, and partly judicial; and when done by express orders of the Court, they are presumed to have been done in presence of the Court. *McAlister v. Serice*, 7 Yer., 278. Thus, in the issuance of divers writs known to the law, upon the fiat of a Judge, their official acts out of term time are judicial proceedings, and when attested and filed, they are invested with the verity of records. They may take depositions and accounts; they issue injunctions and writs of supersedeas out of term time, *in forma pauperis*, upon

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the order of a Judge dispensing with security, Code, 313; they administer oaths in and out of term time, in all cases in which the authority to do so, in the particular case, is not vested in some other officer, Code, 4050, and the Deputy has all the power of the Clerk. Code, 4050. When they take and file a bond for the prosecution of an appeal, it becomes a part of the record in the appellate court, on which judgment may be recovered at any time against the appellant and his sureties, without notice. Code, 3161. And so in administering the oath *in forma pauperis*, the affidavit becomes a part of the record, and if not transcribed into the record, it is fatal.

If the person appealing in such form, fail to prosecute his suit successfully, the Court is not precluded from rendering a judgment against him for costs, Code, 3195, and by a fair construction of the statute, if it be made to appear in this Court that the affidavit is not true, the cause may be dismissed. Code, 3194. The spirit of our legislation, of late years, has been to break down the hedges of technical rule, and deal with substance. The paramount duty of the Court is, to strike the balance between the parties upon the merits of the controversy. "No judgment, decision or decree of the inferior Court can be reversed here," unless for errors which affect the merits of the judgment, decision or decree complained of. Code, 4516. And this Court is required, in all cases where, in its opinion, complete justice can not be had, by reason of some defect in the record, want of proper parties, or oversight without culpable negligence to remand the cause to the court below for further proceedings, with proper directions to effectuate the object of order,

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and upon such terms as may be deemed right. Code, 3170. These provisions are very broad and comprehensive. They sufficiently indicate the spirit of our legislation, and admonish the courts that the day for determining the rights of the citizen by the quilllets of legal legerdemain has passed away.

The only question really before the Court, in the case of *Davis v. Dyer*, 5 Sneed, 680, was, whether the oath *in forma pauperis*, upon appeal from the Circuit Court to this Court could be taken before a Justice of the Peace. It was very correctly held that it could not. In that case, it is stated to be the doctrine of the Court, that the oath must be taken in court. A very liberal rule, however, was announced in the case of *Morris v. Smith*, 11 Hum., 135. If any person, say the Court, shall appear before the Clerk of a Court, and make the affidavit prescribed by the Act of 1821, c. 22, authorizing poor persons to begin suits, or prosecute writs of error, without security, such Clerk is bound to issue the writ, and has no discretion to refuse to allow it. If the affidavit be insufficient, its defects may be supplied, or if untrue, the party may give security for the prosecution of the suit or appeal. This Court has uniformly held, that, where an insufficient bond for appeal or writ of error has been taken, it may be amended, and the proper bond given. The pauper's oath is substituted in the place of the bond and security, and when untrue or defective, may be amended or supplied, as in case of an insufficient bond. 11 Hum., 135. In the case of *White v. Henderson*, where time had been allowed, upon appeal, to take the pauper oath out of term time, this Court, upon a motion to dismiss, allowed the

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party time to give security, or take the oath in this Court. 1 Heis. Dig., 152. And it was held in *Brown v. Brown*, that a motion to dismiss, because time was given below to take the pauper oath, must be made before the cause is reached or any step taken, as an order for an account; but a continuance by consent was not such a step as to preclude the motion. *White v. Henderson*, 1 Heis. Dig., 152.

We have recently held that even where the appeal bond is given after the time allowed by the Court, a motion to dismiss at the fourth term after the record is filed, comes too late. *Tedder v. Odum*.¹ And in the case of *Gillespie v. Goddard*, it was held that irregularities in bringing up cases on appeal were waived, unless the motion to dismiss was made at the first term after notice of the filing of the transcript. 1 Heis., 777. And we have held, at the present term, that an appeal taken to this Court, upon a pauper oath, taken before the Clerk below, out of term time, and at a time unauthorized by the order of the Court, was a nullity. We adhere to the latter ruling, because the Clerk had no authority of law, in case of appeal, to take such affidavit. The difference between that case and this is, that in this case the Clerk, in taking the affidavit, acted under the express authority of the Court.

We are unable to reconcile the doctrine of some of our cases upon this subject with sound principle. We can not see a substantial reason for discriminating in favor of that class of our citizens who have wealth and ability to

¹ *Ante*, p. 50.

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bring their causes here upon appeal bond, and against another class, who, from poverty and misfortune, are unable to do so. If the rich man is to be allowed time out of term time to bring up his cause in his way, why not vouchsafe to the poor man the like privilege?

Upon a review of all the authorities, and the liberal provisions of our statutes prescribing a practice for this Court, and allowing this Court to prescribe its own rules of practice, we hold, that, upon appeal *in forma pauperis* from the Chancery Court to this Court, the oath may be taken before the Clerk out of term time; provided, it appears of record that such oath was taken under the express order or decree of such Chancery Court; that such action by the Clerk and Master, under the sanction and direction of the Court, is a judicial proceeding, in the sense of the law.

There are other questions presented in the argument of this motion, but we rest its decision upon the main question discussed in this opinion, as it has come now to be one of great public importance.

The motion is disallowed.

A. W. Williams v. Thomas Cosby, Ex'r.

A. W. WILLIAMS v. THOMAS COSBY, Ex'r.

COSTS. *Successful party. Discretion as to costs.* A plaintiff, obtaining a judgment for less than he claimed before a Justice of the Peace, took the case by *certiorari* to the Circuit Court, where the judgment of the Justice was affirmed. Held, that he was not entitled to recover the costs of the *certiorari*.

Code construed: 3197, 3219, 3220.

FROM SMITH.

Appeal from the judgment of the Circuit Court, A. McCLAIN, J., presiding.

S. M. FITE, for defendant, cited the Code, 3220.

NICHOLSON, C. J., delivered the opinion of the Court.

The only question in this case is, whether the Circuit Judge erred in adjudging the costs of the Circuit Court against the plaintiff. He had sued the defendant before a magistrate, claiming \$85, on an account. The Justice gave a judgment in his favor for one dollar. This judgment he brought by *certiorari* to the Circuit Court, where, under a proper charge, the jury affirmed the judgment of the Justice of the Peace. Upon this judgment the Circuit Judge adjudged the costs of the Circuit Court against him. He then appealed to this Court.

The question is, whether the plaintiff was successful, in the meaning of the law, in his suit in the Circuit Court. He had succeeded, before the Justice of the Peace, in getting a judgment for one dollar, but he was dissatisfied with the judgment, and took the case to the Cir-

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cuit Court, for the purpose of having a trial *de novo*, and of reversing the judgment below, or of obtaining a judgment for a larger amount.

By the Code, 3197, "the successful party in all civil actions, is entitled to full costs, unless otherwise directed by law, for which judgment shall be rendered." By section 3219: "The law of costs shall be construed remedially, and not as the penal law." By section 3220: "And if any case shall occur not directly, or, by fair implication, embraced in the express provisions of the law, the Court may make such disposition of the costs as, in its sound discretion, may seem right."

As a general rule, the party is regarded as successful who sues and obtains a judgment. But this rule is not of universal application. There are several statutory exceptions, as in the cases in which parties recover no more costs than damages. In those cases, although the plaintiff obtains a judgment, yet he is not successful, in the meaning of the law, and hence he is not entitled to full costs. Then the statute contemplates cases which are not expressly embraced in the general rule, and in such cases the Court may exercise a sound discretion, adjudging the costs remedially.

In the case before us, the plaintiff sued before the Justice of the Peace for eighty-five dollars, but he recovered only one dollar; yet he obtained a judgment, and was, therefore, successful, and entitled to costs before the Justice of the Peace. But he was not satisfied with his success. He determined not to accept and abide by the dollar judgment. He obtained a *certiorari*, which was tantamount to a new suit for eighty-five dollars. In this sec-

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ond suit he failed to obtain a judgment for any more than the dollar, which he had rejected. He obtained an affirmance of his dollar judgment. He failed to have the Justice's judgment reversed. That was the object of his proceeding. In this he was not successful. This makes a case for the exercise of the sound discretion of the presiding Judge. It does not fall expressly, or by necessary implication, within the general rule. We can not say that the Judge exercised this discretion unwisely. We, therefore, affirm the judgment.

DILLARD AND MOSS, Adm'rs, v. JARED.

AGENCY. *Confederate Notes.* An agent to whom a judgment was assigned for collection, receiving it in Confederate notes, and entering satisfaction on the docket, the payment was held to be good, in the absence of proof that the defendant had notice of the agency.

FROM SMITH.

Appeal from the Circuit Court, A. McCLAIN, J., presiding.

S. M. FITE, for plaintiff, cited *Stewart v. Donnelly*, 4 Yer., 177; *Lytle v. Smith*, 3 Hum., 327; *Scruggs v. Luster*, 1 Heis., 154.

A. A. Swope, for defendant, cited *Henley v. Franklin* 3 Cold., 472; *Shurer v. Green*, *Ib.*, 426; *Keppel v. Peters*

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burg, R. R. Co., before C. J. Chase, U. S. Circuit Court at Richmond; *Thorington v. Smith*, 8 Wal., —; *Bank v. Massey*, ante, 360.

NICHOLSON, C. J., delivered the opinion of the Court.

Plaintiffs recovered a judgment before a Justice of the Peace in Smith county, in May, 1860, against defendant, for \$90.74. In 1861, Alexander Dillard came from Arkansas, and claimed to be the agent of Mrs. Skidmore for the collection of her distributive share in the estate of Wm. Dillard, of which plaintiffs were administrators, or to be the owner of said share by purchase. The proof is not satisfactory in which capacity he was acting. He procured the plaintiffs to transfer the judgment on the Justice's docket, for value received, to Robert Traywick. The debt was collected by Traywick from Jared, the defendant, in Confederate money, and the execution docket was by him marked satisfied. Alexander Dillard afterwards refused to receive the Confederate money from Traywick; and in 1866 the Justice, upon *scire facias*, set aside the entry of satisfaction upon his docket. From this judgment on the *scire facias* Jared appealed to the Circuit Court.

Upon the trial in the Circuit Court, the question was submitted to a jury, who found for the defendant. The cause is here by appeal taken by the plaintiffs below.

On the trial in the Circuit Court, Traywick was examined as a witness, to prove declarations of Alexander Dillard, as to the collection of the judgment, and as to the employment of witness to collect the money. Several

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questions as to the competency of the declarations of Dillard are raised; but we deem them unimportant, as the verdict of the jury is fully sustained by the fact that the judgment had been transferred on the docket for value received, to Traywick. This gave him such a title to the judgment that he had a right to receive payment and enter satisfaction. This was done, and there is no proof of any fraud or collusion between Jared and Traywick; nor does it appear that Jared had any reason to believe that Traywick was not, in fact, fully authorized to receive payment. If Traywick had been merely the agent of Dillard, without express authority to exercise his discretion as to the kind of money to be received, a payment in Confederate money by Jared would not have released him.

This is conclusive of the case. It was a voluntary receiving of the Confederate money by the assignee of the judgment, who had a right to receive the Confederate money and discharge Jared, the debtor.

The judgment will be affirmed.

James H. Vaughn, Ex'r, &c., v. Elizabeth Smith.

JAMES H. VAUGHN, Ex'r, &c., v. ELIZABETH SMITH.

BOOK DEBTS. *Act of 1865, c. 10.* The limitation of two years, within which a book debt must be proved, is within the Act of 1865, c. 10, s. 1, and the time was extended by that act.

Statute construed: 1865, c. 10, s. 1.

Code cited: 3781.

FROM SMITH.

Appeal from the Circuit Court, A. McCLAIN, J., presiding.

A. A. SWOPE, for the plaintiff.

NICHOLSON, C. J., delivered the opinion of the Court.

James H. Vaughn, as executor of John C. Bridgewater, sued Elizabeth Smith before a Justice of the Peace of Smith county, on an account for goods sold to her in 1860, and down to August, 1861. The suit commenced in May, 1867. The Justice gave judgment against the defendant for \$8, whereupon she appealed to the Circuit Court. Upon the trial in the Circuit Court, the plaintiff offered to prove the account of his testator, by swearing according to the book debt law. This was objected to, because it appeared on the face of the account that more than two years had elapsed since the goods were delivered. The objection was sustained, and the evidence rejected. The plaintiff having no other evidence, under the ruling of the Court, the jury found for the defendant, on which judgment was given. From

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this judgment the plaintiff appeals in error to this Court.

The question for determination in this case, is, whether the Act of 1865, c. 10, s. 1, saves the bar of two years, within which plaintiffs, under section 3781 of the Code, are allowed to prove their book debt accounts by their own oaths. By that section, plaintiffs may prove "the sale and delivery of articles not exceeding seventy-five dollars in value, which were delivered within two years before the action brought." This was an exception to the general law, which excluded parties from being witnesses in their own cases. But the limitation of two years from the date of the sale of the goods was annexed to the exercise of this right. It was not only an act prescribing the character of evidence by which accounts for goods, wares and merchandise sold, could be proven and recovered, but it was an act of limitation prescribing the time in which suits must be brought on such accounts, in order that the same might be established by such evidence.

By the Act of 1865, c. 10, s. 1, it is provided that "no statute of limitations shall be held to operate from and after the 6th of May, 1861, to the 1st day of January, 1867; and from the latter date the statutes of limitations shall commence their operation, according to existing laws." Then follows this additional provision: "And the time between the 6th day of May, 1861, and the 1st day of January, 1867, shall not be computed; nor shall any writ of error be refused or barred in any suit decided since the 6th day of May, 1861, or within one year immediately prior to that date, by reason of

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lapse of time." The suspension of the operation of all statutes of limitations from the 6th of May, 1861, to the 1st of January, 1867, is clearly and unequivocally expressed in the first clause of the section. Language could not make the intention of the Legislature more distinct and apparent than that used; yet this clause is followed by another, which either means to express identically the same intention, or it was intended to add to the breadth of the first clause: "And the time between the 6th day of May, 1861, and the 1st day of January, 1867, shall not be computed." How, shall not be computed? In fixing the operation of the statutes of limitation? The previous clause had fixed the operation of the statutes of limitations between the two periods named, as clearly as language could do it. Then why repeat exactly the same idea in other language, unless it was intended to include by the broader language the purpose of preventing the computation of the time between the two periods named, in other statutes as well as the statutes of limitation? It is our duty to give full force to the language employed by the Legislature, for the purpose of effectuating the object intended to be accomplished. A civil war had prevailed for four years, during which the rights of persons and the titles to property might be seriously affected by the lapse of the time during which rights could not be asserted nor titles protected by a resort to the courts of justice. To prevent these consequences, it was wisely provided that no statute of limitations should operate from the beginning of the war until law and order should be fully restored, which it was assumed would occur by the 1st of January, 1867;

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but, for fear that the mere suspension of the operation of the statutes of limitation might not prevent all the evil consequences of the lapse of time, it was further provided that the time from May 6th, 1861, to January 1st, 1867, should not be computed; meaning that this lapse of time should not be so computed as to affect such rights or titles as might not be protected and secured by providing for the suspension of the statutes of limitations.

The case now before us falls directly within the spirit and reason of the language employed in this section. The goods sued for were delivered in August, 1861. By the law as it then stood, the plaintiff had a right, at any time within two years, to establish the account by the book of his testator. But when the war closed, and the courts were re-opened, the two years had expired, and the right to use the book as evidence was lost, unless it was saved by this act. We think it was so saved, and that the Legislature employed the language quoted above for the purpose of preventing the loss of rights in such cases, not falling technically under any of the statutes of limitation.

The Circuit Judge erred in rejecting the evidence. The judgment is reversed, and the cause remanded for a new trial.

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SILAS ANDERSON v. J. M. MABERRY.

1. EVIDENCE. *Secondary. Admission of.* The admission of secondary evidence is a preliminary matter for the Judge. It may be allowed, upon a reasonable presumption that the primary evidence is lost.
2. SAME. *Same. Proof to admit. Custodian.* That a paper was left by a party at his home, when he left home during the war; that he is informed, and believes, that it was destroyed by his wife; that he has made diligent search, and cannot find it; that he is assured by his wife that she burned it, is sufficient evidence of loss or destruction to admit secondary evidence.
3. SAME. *Witness. Incompetency for want of religious belief.* A witness may be shown to be incompetent for want of religious belief, either by an examination on *voir dire*, or by proof of his declarations on the subject, at the option of the party seeking to exclude him.

Cases cited and approved: *Harrel v. The State*, 1 Head, 125; *Tyree v. Magness*, 1 Sneed, 276.

FROM JACKSON.

From the Circuit Court, A. McCLAIN, J., presiding.

J. W. McHENRY, R. A. COX and A. W. DEWITT, for the plaintiff, cited, on the admission of secondary evidence: *Vaulx v. Merriweather*, 2 Sneed, 683; *Pharis v. Lambert*, 1 Sneed, 228; *Hale v. Darter*, 10 Hum., 92; *Tyree v. Magness*, 1 Sneed, 276; 1 Greenl. Ev., § 558; *Ralph v. Brown*, 3 Watts & Serg., 395. On defect of religious belief: 1 Greenl. Ev., § 370, n. 2, 12 ed.; *Commonwealth v. Smith*, 2 Gray, 516; 1 Swift's Dig., 739; 5 Mason, 19; 4 Am. Jurist, 79, n.; *The Queen's case*, 2 B. & B., 284.

A. A. SWOPE, for defendant, cited 1 Greenl. Ev., § 558; *Shortz v. Unigiest*, 3 Watts & Serg., 45; *Watterson*

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v. *Watterson*, 1 Head, 1; 1 Head, 125; *State v. Cooper*, 2 Tenn., 96; 1 Swan, 411.

NICHOLSON, C. J., delivered the opinion of the Court.

Plaintiff sued defendant for the value of a mule, alleged to have been taken from him in 1863, by a squad of guerillas, of whom defendant was the guide and pilot; and, also, for the value of the mule, which plaintiff alleges defendant promised to pay.

Defendant relies upon the defense that he was the guide and pilot of the guerillas by coercion and force, and that he promised to pay for the mule under fear, produced by threats of military coercion, made by a brother of plaintiff, who had command of a military force.

The cause was tried by three juries, all of which found verdicts for the defendant. From the judgment rendered on the last verdict, plaintiff has appealed to this Court.

The charge of the Circuit Judge was unexceptionable, and there is sufficient evidence to sustain the verdict, if all the evidence allowed to go to the jury was legal.

It appears in proof, that, after the mule was taken from plaintiff, his brother, who was in command of a military force at Carthage, wrote a letter or order, addressed to defendant, threatening him with summary punishment, if he did not pay to plaintiff \$125 for the mule. This letter was handed to plaintiff, and by him conveyed to defendant.

On the trial, defendant offered to prove the contents of the letter or order; and, to lay grounds for so doing, he made an affidavit, in which he stated that "plaintiff handed to him an order, made by F. M. Anderson, who

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held some military official position at Carthage, at the time. Said order required defendant to pay for the mule in controversy, and was handed to affiant by plaintiff, not long after the mule was taken; but affiant, because he was threatened in said order with personal violence, if he did not pay for said mule, left home and went out of the country, and left the order at his home, and the same can not now be found. He is informed and believes that his wife destroyed the same in his absence. He stated, further, that, since the last term of the Court he has diligently searched in his house, among his books and papers, for the order from Anderson, and has been unable to find it, and he verily believes the same is destroyed. He has been anxious to find the same; has often talked to his wife as to the certainty of its destruction, and she always assured him she burned it up; but, thinking there might possibly be some mistake about the matter, he has, as before stated, made diligent search, in good faith, to find the same, and failed. The destruction of the paper was without affiant's knowledge or procurement."

Whether secondary evidence can be received or not, is a preliminary question, to be determined by the presiding Judge. He must determine from the proof, whether there is a reasonable presumption that the paper has been lost. If there be no ground of suspicion that the paper is suppressed, ordinary diligence to produce it will be deemed sufficient; and what is proper diligence, must depend much upon the circumstances of the case. *Tyree v. Magness*, 1 Sneed, 276. Hence, before secondary evidence can be admitted as to the contents of a lost paper, the evidence, of the person who was the proper custodian of it,

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as to its loss, must be adduced. In this case, defendant received the letter from plaintiff, and, therefore, would be the custodian of it. He states, that when he left the country, on account of the threat contained in the letter, he left it at his house. He does not say that he left it in the custody of his wife, but left it in his own house. He states that he has searched diligently for it, and that he has been unable to find it. He says his wife informed him that she destroyed it. He further states that he was anxious to find it, and that, if destroyed, it was not done with his knowledge or procurement. As it does not appear that defendant's wife was charged with the custody of the letter, and as we can see no ground of suspicion that the paper has been suppressed, we think the Circuit Judge exercised his discretion properly, in allowing the contents of the letter to be proven.

It is next insisted, that the Circuit Judge erred in refusing to permit plaintiff to introduce witnesses to prove that Drury Smith, a witness for defendant, was incompetent, on account of his disbelieving in a God, or in a state of future rewards and punishments. This objection was made to the competency of the witness when he was first introduced, at which time plaintiff offered to call witnesses to prove his declarations as to his want of religious belief. The Court overruled this motion, and directed the counsel to examine the witness touching said incompetency. Thereupon the counsel asked him, if he had not said to Lucinda Smith and George Kinnard, that there was no more God or Devil than in the palm of his hand, which witness denied; and if he believed in a future state of rewards and punishments, and if he be-

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lieved in a God. To these last named questions, as to his belief, the record does not show that the witness made any answer. Thereupon plaintiff's counsel proposed to call Lucinda Smith and George Kinnard, to prove the fact that witness had made said statements, in order to establish his incompetency. The Court overruled the motion, and ruled that said witnesses could only be called to contradict the witness, and not with a view of establishing his incompetency by showing his disbelief in a God, or future state of rewards and punishments; and the Court ruled that the plaintiff must first fix the time and place. It seems, from the record, that Lucinda Smith and George Kinnard were not examined. The Court ruled that witness, Drury Smith, was competent, and directed the counsel of defendant to examine him, which was done, over the objections of plaintiff's counsel.

This exact question arose in the case of *Harrel v. The State*, 1 Head, 125. In that case, after alluding to the conflict in the authorities as to the mode of making proof of the incompetency of a witness in such cases—whether by examination of the witness himself, or by proof of his declarations to other persons—Judge McKinney said: “We have held recently, in a case not reported, that the party seeking to exclude a witness on this ground may adopt either mode of proof; and we adhere to this determination, as the better practice. If the witness really disregards the obligation of an oath, it would seem to be neither safe nor consistent to resort to his examination. If he has voluntarily avowed his disbelief, we perceive no reason why this should not be proved in the same manner as any other fact.”

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Upon this authority, which we adopt as laying down the best rule of practice, the Circuit Judge erred in not permitting plaintiff's counsel to call witnesses to prove the declarations of Drury Smith, as to his disbelief in a God, and in a state of future rewards and punishments, and in requiring him to resort to the examination of the witness himself. The record shows the evidence of Drury Smith to have been material on the issue before the jury. For this error the judgment is reversed, and the cause remanded for another trial.

JAMES W. REVIS v. JOHN WALLACE.

1. RECORD. *Appearance. When and for what purpose disputable.* In an action of trespass in which the defendant was not served with process, his father without authority made a compromise, which was signed by the plaintiff alone. This was entered on the minutes: the entry beginning "Came the parties by their *attorney*, and file the following agreement." In a suit brought before this entry was made, by the defendant in that suit against the plaintiff therein, this entry was offered to show a ratification by the present plaintiff of the agreement; held, that he might show by proof that it was made in his absence, and that he had no attorney in that case.
2. RATIFICATION. *Record. Attorney.* A ratification of an unauthorized agreement is not proved by the entry of such agreement on the minutes of a court in a cause to which it relates, in the presence of the party's attorney.

FROM WHITE.

Error to the Circuit Court. W. W. GOODPASTURE,
J., presiding.

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S. H. COLMS, for defendant, cited Story on Agency, § 251 to 254, 256.

NICHOLSON, C. J., delivered the opinion of the Court.

Plaintiff sued defendant in replevin, in December, 1865, for a horse. The horse was taken by the Sheriff and delivered to plaintiff. The suit was tried in 1868, when the jury found a verdict for the defendant, assessing his damages for the detention of the horse at \$217.75, the value of the horse at \$150, and the interest on the value of the horse at \$25.12, upon which verdict judgment was rendered. Upon the refusal of the Court to grant a new trial, plaintiff tendered his bill of exceptions, and prosecuted a writ of error to this Court.

It appears from the bill of exceptions, that during the late war, plaintiff, being an officer in the Confederate service, took from defendant a horse, under military orders. After the close of the war, defendant commenced an action in the Circuit Court of White County, against James Revis and J. Scott, for damages in the taking of the horse. Plaintiff being then absent in Warren county going to school, the summons was not served on him. Without his knowledge, his father, Toliver Revis, compromised the suit with defendant, entering into an agreement with him to dismiss the suit against plaintiff and Scott, upon Toliver Revis' delivering to him a horse, which belonged to plaintiff, and which had been left by him with his father, to be fattened—defendant agreeing, also, to deliver to Toliver Revis a small mare, which plaintiff had left with defendant, when the horse was taken from him. Defendant signed a written memorandum of the

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agreement, and delivered it to Toliver Revis, whereupon the compromise was carried out, by the exchange of the horse for the mare. This agreement was made on the 15th of September, 1865.

At the May Term, 1866, of the Circuit Court, and after Revis had commenced his action of replevin, the following entry was made on the minutes, viz :

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“Came the parties by their attorney and file the following agreement, viz: ‘This memorandum of agreement made between James W. Revis and Jack Wallace, witnesseth, that James W. Revis has this day given to the said Wallace a good horse in the place of one which he previously took from him under military orders; the said Wallace agrees to dismiss a suit he has brought in the Circuit Court of White County, Tennessee, for the value of said horse, previously taken from him by the said Revis. Given this 15th day of September, 1865.’

“JOHN WALLACE.’”

“Then came Toliver Revis and assumed two dollars and fifty cents of the costs, and John Wallace assumed the residue of the costs. It is therefore considered by the Court, that the plaintiff recover of the said Toliver Revis two dollars and fifty cents of the costs, and that the defendant recover of the plaintiff the remainder of the costs, and that execution issue.”

Plaintiff objected to the introduction of this record, and moved to set it aside by proving that he never consented, either by himself or attorney, to said order, and that he never had any attorney in said cause; but the Court rejected the proposed motion and evidence, and overruled plaintiff's

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objection to the reading of the record, when the same was read. The horse was proved to be worth from \$125 to \$175, and his use from 25 to 50 cents a day. When plaintiff was informed by his father of the arrangement he had made with defendant, he repudiated it and determined to reclaim his horse. For that purpose he instituted this action of replevin in December, 1865.

The Circuit Judge charged the jury that, "the records of this Court are conclusive proof of all the facts that they show, and can not be disproved by other evidence, but are conclusive. So, if the records of this Court show, that in the case in this Court of John Wallace against James W. Revis and James Scott, the parties appeared by attorney and produced the written compromise signed by John Wallace, that has been read to you, it is conclusive of the fact, that the parties did appear by attorney and produced said writing, and this fact can not be disproved by other evidence."

It is manifest, that under this charge the jury had nothing more to do, than to ascertain the defendant's damages. The leading question of fact, was, whether the plaintiff had ratified the act of his father, Toliver Revis, in making the compromise with defendant. If the record in the case of John Wallace v. James W. Revis and J. Scott was conclusive of the fact that plaintiff by his attorney had appeared in Court and had the agreement of compromise entered of record, it would follow almost necessarily, that this was a ratification of the agreement of compromise. But upon examination of the record it is apparent that it was not between the same parties. This is a suit between James W. Revis and John Wallace. The record shows a

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suit of John Wallace against James Revis and J. Scott.

The agreement spread on the minutes was signed by John Wallace alone, and therefore was not binding on plaintiff, unless he had ratified it, and this could not be inferred, from the simple fact that his attorney was present in court when the paper was spread on the minutes. It was no more plaintiff's agreement when placed on the record than it was before. The charge of the Court might well be construed by the jury as settling the question of the ratification of the compromise by the plaintiff. The proof shows that the paper was produced in court by the attorney of Wallace, and that plaintiff was not represented at the time by any attorney. It was, therefore, error in the Court not to exclude the agreement when offered as a part of a record; and it was also error to charge the jury that the recital in the record was conclusive upon the plaintiff, so far as it could bear upon the question of ratification of the agreement.

The judgment below will be reversed, and the cause remanded for a new trial.

FRAZIER v. TUBB AND STOKES.

1. MISTAKE. *Lands sold, not conveyed.* Where lands intended to be conveyed are omitted from a deed, and it turns out that the vendor has no title, the vendee is entitled to recover for the value of the land not conveyed.
2. CHANCERY JURISDICTION. *Mistake.* It seems that a Chancery Court is the appropriate jurisdiction to afford this relief, as a recovery of money paid under mistake. If not, the objection must be taken *in limine*, and is waived by answer.

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3. **EXECUTOR.** *Personally liable for money paid by mistake.* In such case, an executor who has made the sale is personally liable for the money received, and must look to the estate for his indemnity. That the estate is settled, will not protect him.
 4. **DAMAGES.** *How computed.* The vendees' compensation, where the sale is in gross, is to be fixed by allowing the value of the land lost, estimating it in proportion to the value of the whole land intended to be conveyed.
 5. **VENDOR AND VENDEE.** *Possession without title. Stat. Lim.* The vendor is not entitled to be allowed credit for property not conveyed, but of which possession is delivered by the vendor to the vendee, and held by him until he acquires a possessory title under the Statute of Limitations.
 6. **REHEARING.** It is not error to refuse a rehearing on motion and affidavit.
 7. **SUPREME COURT.** *Practice.* A point reserved in the decree below cannot be reviewed in the Supreme Court.
- Cases cited : 4 Cold., 372; 3 Head., 372.

FROM DE KALB.

Appeal from a decree of the Chancery Court at Smithville. B. M. TILLMAN, Ch., presiding.

R. CANTRELL, for complainant, cited *Phillips v. Hollister*, 2 Cold., 269; *Lewis v. McLemore*, 10 Yer., 206; 1 Sto. Eq., 193; *Merriwether v. Larmon*, 3 Sneed, 448; *Donaldson v. Weakley*, 3 Yer., 178; *Walker v. Dunlop*, 5 Hay., 271; *Fisher v. Probhart*, 5 Hay., 75.

N. & ED. BAXTER, for Tubb, insisted, that Equity cannot render personal decree for damages: 11 Paige, 288; 4 John. Ch., 560; 5 John. Ch., 195; 38 Maine, 521-2; 2 Beav., 465; 17 Ves. Jr., 277, 278; 14 Ves. Jr., 129 and note; 2 Dev. Law, 24; 3 Meriv., 247, 8; 25 Maine, 532. Jurisdiction of damages ancillary to that

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of specific performance, or the like: 1 Hilliard Vend., pp. 419, 336; 2 Hil. Vend., 283, 284; 2 Story Eq. Jur., § 794, 799. No specific performance for want of title: 1 Story Eq. Jur., § 716, note 3, § 769; 2 Hil. Vend., p. 283; 2 Sch. Lefr., 553. Mutual mistake, as to existence of thing sold, but not as to matter of value, ground of relief. Representation, upon a point equally open to both parties, must be positive, not mere matter of opinion: 3 Jones Law, 224, 73; 19 Ark., 528; 20 Ga., 654; 11 Mo., 657; 3 Story R., 691, 695; 11 Paige, 288; 2 Iredell Law, 34, 35; 3 Ired. Eq., 486; 4 Dana, 370; 19 Ga., 450; 9 Ired., 576; 2 Iowa, (Clarke,) 114; 5 Blackfd., 20; 5 Jones' Eq., 180; 10 B. Mon., 458; 15 B. Mon., 627; 12 Mo., 519, 520; 1 Story Eq. Jr., §§ 191, 197, 200, a.; 1 Hil. Vend., 329, § 10, pp. 327, 330; 5 Yer., 471; 1 Yer., 20; 9 Yerg., 45, 47. To correct instruments by parol, proof of mistake and misrepresentation, must be clear. 1 Hil. Vend., 308, 323; 8 Hum., 233; 1 Hum., 439; 30 Ill., 249. Purchaser must be vigilant, and forfeits his right of action by delay: 1 Story Eq. Jur., § 769; 1 Hil. Vend., 330, 331; 9 Ind., 581; 7 Blackfd., 184, 5; 5 Hum., 548; 3 Head., 102; 1 Story Eq. Jur., § 693; 10 B. Mon., 459; 3 Story R., 631, 629, 698; 2 Hum., 45. Executed contracts: 5 Yer., 471. Relief by rescission, only on offer of vendee to restore land; 3 Sneed, 436, 7; 1 Cold., 320; 4 Dana, 374; 11 Gratt., 475; 9 Ind., 478; 4 Ind., 456, 7; 7 Blackfd., 55; 6 Blackfd., 187; 1 Hil. Vend., 426; 20 Geo., 658; 35 Penn. St., 293. Insisted, that plaintiff got excess of land within the deed, and that this should compensate

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for loss without: 36 Ala., 177; 5 Eng. L. and Eq., 166; 1 Hil. Vend., 239, 319. Extreme measure of damages should have been the consideration money and interest: 3 Head., 450; 4 Hum., 99; 8 Hum., 653.

JORDAN STOKES filed a petition for rehearing, in which the following authorities were cited: 1 Story Eq. Jur., §§ 399, 400, a, and notes; 1 Story Eq. Jur., §§ 119, 120, 197-9, and notes; 1 Heis. Dig., 532; 1 Story Eq., § 193; *Philips v. Hollister*, 2 Cold., 269; *Lewis v. McLermore*, 10 Yer., 206; *Merriwether v. Larmon*, 3 Sneed, 448; 1 Greenl. Ev., § 176; *Osgood v. The Manhattan Co.*; 3 Cowen Rep., 623; *Dan v. Brown*, 4 Cow. R., 483; *Smith v. Vincent*, 15 Conn. R. 1; 1 Greenl. Ev., § 178; *Williams v. McCormack*, 7 Hum., 308; *Shute v. Wade*, 5 Yer., 1; *Coles v. Anderson*, 8 Hum., 489; *Dickens v. Sheppard*, 3 Mass. Rep., 526; *Marrs v. Giliam*, 1 Cold., 488; *Scales v. Cockrill*, 3 Head., 432; *Meadows v. Hopkins*, Meigs' Rep., 181; *Redmond v. Bowles*; 5 Sneed, 547.

FREEMAN, J., delivered the opinion of the Court.

This bill is filed to have, in the language of the prayer of the bill, a contract for the sale of land "set up, and a title bond reformed or corrected, according to the contract and understanding of the parties," and to have compensation for 100 acres of land and 10 acres, alleged to have been sold by defendants to complainant, to which they have no title, and which, it appears, was not included in the deed made for the land, though supposed by both parties at the time, to be so included.

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It is insisted, in this case, that the relief sought can not be given, because compensation is only granted in courts of chancery, as incident to other relief; as specific performance, when asked on the part of a vendee, with compensation for deficiency in quantity. This question is not fairly made before us in this case, as the defendants failed to take advantage of want of jurisdiction of a court of equity, by a proper demurrer. Having answered, it is a waiver of the objection to the jurisdiction of the Court over the subject matter, as well as over the person, notwithstanding the matter might have been of legal cognizance. 4 Cold., 372; 3 Head, 372.

There is a claim made in the bill for the expenses incurred in defending a suit brought to recover the land from the vendee, and for costs and attorney's fees, which is not decided by the Chancellor, but is reserved. We can not, therefore, notice it.

The facts of this case show clearly that complainant purchased, as he supposed, the one hundred acres and the ten acres in controversy. It is equally certain that defendants thought they were selling this land. This not only appears from the statements of the answer, but also from the fact that they placed complainant in possession of the land as part of the purchase. The proof sustains this view, independent of the admissions of the answer.

The simple question, in this aspect of the case then is, can a party, in any court, either of law or equity, recover the purchase money, where it was paid for property, which, by mutual mistake of vendors and vendees, he fails to get any title to; in other words, where the consideration for the payment entirely fails? We hold

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that he can certainly do so, in a court of law; and we think, in a case like this, where an account is sought for improvements, or, perhaps, without it, under the general jurisdiction of a court of equity to give relief against mistakes to the injury of a party, innocently made, that this Court might well take cognizance of the question, and give the party relief, under the idea of compensation for loss occasioned by such mistake. However this may be, it is certain, as we have said, that the right to recover back money paid under a mistake of facts, and to a party who has no claim in conscience to retain it, can not be questioned. *Dickens v. Jones*, 6 Yer., 483; *Bank of Commerce v. Union Bank*, 3 N. Y., 237; 1 Hill, 287.

As to what amount is to be recovered by complainant, we hold that the price paid for the land to which the title fails, or which was not included in his deeds, with interest, is the sum to which he is entitled; that is, as he purchased, by the terms of the contract, the one hundred acres, and the ten acres, and paid an agreed price for this land, in connection with other land, and fails to get what he bought and paid for, he is entitled to that money, and interest on the sum so paid by him.

The Chancellor did not allow anything to the purchaser for a portion of the land; probably on the ground that the complainant had not been ousted of the possession of that portion, but had maintained his possessory right under the statute of limitations. Whatever right he got in this way was not derived from the defendants, and can not abate the right of recovery in this case. Besides the possessory right asserted and maintained in

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the suit at law, not being under color of title, will end, or, rather, has ended, by his death. So that the decree of the Chancellor will be modified to this extent, on this question.

The question is presented, as a matter specially appealed from in the Chancellor's decree, of the liability of Stokes, the joint executor, who conveyed what land was conveyed in connection with Tubb, the other executor. The Chancellor dismisses the bill as to him, and Tubb objects to this, insisting that as it was a joint sale and conveyance, the liability must be joint. It may be remarked, that the liability does not arise on the deed or on the title bond, but out of the fact that the land was sold by the understanding of the parties and paid for, but, by mistake, not included in the conveyance, and can not be, for want of title. There is a failure on the part of the vendors to make delivery, so to speak, of what they have received the money for; and therefore they, in equity and good conscience, can not keep the money. In this view of the case, we can not see how Stokes is not bound to refund whatever money he may have thus received. An inquiry will be directed to be made by the Clerk and Master, to ascertain whether any portion of this money went into the hands of Stokes; and if so, to that extent he will be decreed to be liable for the same, in connection with his co-defendant, Tubb.

It is insisted for Stokes, that he has settled his trust as executor, and been denuded of his office of executor. This can not change his liability, as it is one personal, not official. The sale of the land actually conveyed by virtue of his power as executor was an official act. But

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he had no authority to sell the one hundred and ten acres, to which his testator had no title or claim. He was acting beyond his authority; and the principle that he who acts under a power or authority as an agent, and exceeds that power, to that extent makes himself personally liable on his contract, would fix his liability personally in this case. He would have recourse on the estate of his testator probably, for the money, if it went into said estate, having been paid to that estate by mistake. At any rate, in this direction lies his relief, if any liability should appear from the report of the Clerk and Master on that question.

While we hold that the measure of complainants' recovery is the amount actually paid for the land which was not included in his deed, yet the sale being in gross for the sum of \$1,050, there is a serious difficulty presented as to how the amount shall be ascertained. We can see no better way, under the peculiar circumstances of the case, than to ascertain the actual value of the 110 acres of the land, at the time sold, in proportion to the whole amount of land intended to be sold at the price specified, and thus arrive at what was the sum paid.

As to the question made on the refusal of the Chancellor to grant a rehearing of the case, on motion of defendant, based on affidavit, we can only say that such a practice is unheard of in chancery proceedings, so far as our knowledge extends, in Tennessee or in England, and the Chancellor was certainly correct in overruling said motion.

The only means of obtaining a rehearing such as was

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sought, was by a petition to the Chancellor, regularly filed and sworn to, stating the grounds for the rehearing. See 33rd Rule of Chancery Pr., Code, p. 984. If this practice had been pursued, we could, on this appeal, have reviewed the action of the Chancellor on this subject; but we can not say that he erred in refusing to rehear a case in a Court of Chancery on motion.

The decree of the Chancellor will be reversed and modified, and one in accordance with this opinion be entered here, the appellants paying the costs of this Court.

On the 4th day of March, 1871, a petition for rehearing having been filed, the following opinion was delivered by FREEMAN, J.:

We have carefully examined the elaborate, ingenious and able argument presented on the part of defendants, especially of defendant Stokes, for rehearing, and modification of the opinion in this case.

We do not feel called on to reply to that argument at length, but only to give our conclusions. The case received the most careful consideration, the result of which was the opinion already delivered. We see nothing in the argument submitted to us to change the result, as declared in that opinion.

The simple point in the case is, that Stokes, in his answer, admits that he received a portion of the purchase money paid for the land. It is proven beyond all question, that this money, or a portion of it, was paid for the one hundred acres and for the ten acres, and that Stokes and Tubbs did not convey this land and could not do so;

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and by virtue of this conveyance, complainant did not get a title to a foot of the land thus paid for. The plain law of the case is, that the parties who received this money, for land which they did not and could not convey, should refund it to the party from whom they received it.

It was a mistake of the parties, in supposing they had conveyed the one hundred acres and the ten acres, and the relief is not predicated at all of any fraudulent misrepresentations alleged to have been made. In this view of the case, it makes no difference whether Stokes contracted for personal liability or not. He is not held liable on covenants, but simply because he has received the money; and the land which was to have been given for it, has not been, nor cannot be conveyed to the party who gave his money for it. Justice and right demands they should not keep the money under these circumstances.

The fact that Stokes has settled in a Court of Chancery with the heirs and devisees of Kelly, can have no influence on the rights of complainant, who was not a party to that proceeding, and can not be affected by it; and without discussing the other questions presented, we affirm our former opinion in this case.

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et als.

LEVY. *On property conveyed to trustee, but decreed to be sold. Satisfaction.*

A debtor made a deed of trust, to secure several creditors, with a power to himself to sell and apply to the purposes of the trust. In August, 1860, he sold a house and lot, and in 1863 collected and applied the proceeds to a particular debt. In a litigation with a creditor, a decree was obtained in 1861 to sell certain lands and negroes, which had been conveyed by the deed, to pay \$962.48, with authority to the Clerk to attach the negroes, if not delivered; and the Clerk having taken and being about to sell the negroes, by consent the sale was postponed for six months, on an agreement that on failure to deliver, execution should issue against the debtor and several sureties. On the expiration of the time, execution issued, and was levied on the negroes and lands. Held, that, though the negroes were conveyed to the trustee, on the decree for the sale of them and the agreement that execution should issue on failure to deliver the negroes, the execution issued could properly be levied on the negroes, and that the levy operated as a satisfaction as to the purchaser of the house and lot, and that the creditor was precluded, (the Coroner having failed to sell the negroes,) from questioning the sale to him.

Case cited: *Evans v. Barnes*, 2 Swan, 292.

FROM DE KALB.

Appeal from a decree of the Chancery Court at Smithville, JOHN P. STEELE, Ch., presiding.

S. M. FITE, for complainant.

J. A. NESMITH, with him, cited *Clark v. Bell*, 8 Hum., 26; *Evans v. Barnes*, 2 Swan, 292; *Etheridge v. Edwards*, 1 Swan, 426; *Pigg v. Sparrow*, 3 Hay., 144; *Young v. Read*, 3 Yer., 297; *Hogshead v. Caruth*, 5 Yer., 227; *Overton v. Perkins*, 10 Yer., 329; *Miller v. Estell*, 8

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Yer., 460; *Bradley v. Kesse*, 5 Cold., 223; *Brown v. Allen*, 3 Head, 429.

R. CANTRELL, for defendants, Morgan & Co. and Eakin & Co., insisted that the levies were void on the land, for vagueness, on all the property, because the title was in the trustee; citing *Childs v. Derrick*, 1 Yer., 79; *Allen v. Holland*, 3 Yer., 343; *Hurt v. Reeves*, 5 Hay., 50; *Hannum v. Wallace*, 4 Hum., 143.

H. DENTON and A. A. SWOPE, for defendants, Inge and Malone's heirs, who claimed "Round Bottom."

FREEMAN, J., delivered the opinion of the Court.

The complainant alleges that one John L. Dearmon, on the 30th of May, 1865, made a deed of trust, by which he conveyed to one A. M. Savage, a dwelling house and lot in the town of Smithville, together with some negro slaves, various other articles of personal property, and a tract of land, known as the "Round Bottom tract," a tract of 227 acres in the same county, a tract containing 84 acres, together with several other town lots in said town. This deed of trust was made to secure a number of debts specified therein, amounting, in all, to between five and six thousand dollars, perhaps. Among these debts, are several owing to defendants, Morgan & Co., and Eakin & Co.

The deed of trust gives Dearmon, the maker of it, and debtor, twelve months to pay the debts in, from its date, and provides that if they are paid, then "the above obligation to be null and void, and the legal title to the property to be and revert to me," that is, Dearmon. It

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goes on then to provide, that in case of failure to pay the debts within the time, the trustee shall sell the property for cash, after advertising the same for a specified time. It then prescribes the order of appropriation of the money arising from the sale, from which it will be seen that the debt of Morgan & Co., of \$639, and of Eakin & Co., of \$1,067, together with a few other debts, are to be paid first, after the expenses of the trust; also, such balance of a debt due Morgan & Co., of \$1,098, for the security of which certain collaterals had been given, as might remain due on account of the insolvency of some of the collaterals, which seems to be assumed as probable. In the conclusion of the deed, he says: "I reserve to myself the right to sell said property at any time, with the consent of the trustee, before said trust is closed, by applying the proceeds as I direct my trustee to apply them." He also reserves "the right to direct the trustee which species of property, real or personal, shall first be sold, until the deed is closed." He also reserves the right to retain possession of the property till the closing of the deed.

The bill of Sewell, the complainant, claims that in, perhaps, August, 1860, he purchased of said Dearmon the dwelling house and lot mentioned in said deed of trust, the said Dearmon acting under the power reserved to him by the provisions of said deed, and that Dearmon informed him that there was no further incumbrance on said land, and that he took a deed, in pursuance of the title bond given him, on paying the purchase money, 12th of January, 1863, and that he had been in possession ever since. He also claims that the money paid for this

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house and lot was applied by Dearmon, properly, to the payment of debts under the trust; said Dearmon, by consent of the creditors, having full control and disposition of the property conveyed. The trustee, Savage, it seems, had died early in the year 1857.

It seems from the answer of Morgan & Co. and Eakin & Co., that in 1856 or 1857, the said Dearmon, in the language of the answer, "pressing his reserved rights, selected this town lot, and the 227 acre tract of land, to be sold to pay respondent's debts, which sale was made by Savage, the trustee, under the direction of Dearmon; and that they, by their agent, bid their debts on the land and town lot, which they had to agree to before said Dearmon and the trustee would agree to sell." The answer then states, that before the trustee made title under this sale he died, and Morgan & Co. and Eakin & Co. filed their bill to obtain a title under said purchase, and to have possession of the same decreed to them. The precise time when this bill was filed does not appear, but we infer from the answer that it was in 1858.

When the bill was filed, Dearmon filed his cross bill, alleging, as the answer states, that the debts were paid, and the sale only intended as a mortgage, to secure these particular debts.

How this litigation progressed, or on what issues, does not precisely appear, as the bills and answer are not in the record. We see, however, that at the September Term, 1860, of the Court, a decree was made in the cause, in which it is declared, after reciting the fact of the conveyance of the property by the deed of trust, and the death of Savage, the trustee, that it appeared "that there is a

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house and lot in the town of Smithville, and a tract of land near Smithville, and a negro woman and two children, which are conveyed in the trust deed, that are undisposed of." It was therefore ordered and decreed by the court, that the Clerk and Master should sell "said town lot, slaves and land, or enough to pay the debts." In a previous part of the decree, it appears that the Clerk and Master had reported the entire indebtedness of Dearmon to complainants in that bill as being \$962.48, which report was confirmed. It was further ordered, that Dearmon deliver over said slaves immediately to the Clerk and Master, and in case of refusal, that an attachment writ issue for the same.

At the March Term, 1861, there appears a decree, reciting the fact that there had been an appeal from the above decree to the Supreme Court; also stating the facts of the said decree as to recovery of the debts referred to, and that the Supreme Court had affirmed said decree, and the Clerk and Master of the Chancery Court had been ordered to execute it, by attaching and selling the land and negroes, together with the town lots mentioned in the deed of trust; not setting out or describing said land or town lots by any more specific description.

It appears from the decree that the Clerk had, in pursuance of the order of the Supreme Court, attached and taken into his possession the three negroes mentioned, "belonging to said Dearmon," and had advertised, and was about to sell these negroes. By consent of the parties, through their counsel, it was ordered that the sale be stayed for six months, upon Dearmon giving securities in open court for the stay of the decree for six months,

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and for the forthcoming of the negroes, and their delivery at the end of that time, to be sold by the Clerk and Master, in satisfaction of the decree, and, by agreement, the negroes were to remain in possession of Dearmon. It was further agreed by the sureties, Hallum and Baker, that if the slaves are not delivered, execution shall issue against them jointly with Dearmon for the debt and costs, and if the property mentioned in the trust deed fails to pay off the decree, that execution may issue against them jointly with Dearmon for the remainder.

On the 16th day of October, the six months having expired on the third Monday in September, an execution was issued, the negroes not having been delivered, and was levied on the three negroes mentioned in said decree, by the Coroner, as appears by his return, and attempted to be levied on one tract of land, said to contain 100 acres, and a town lot, known as Lot No. 9. This levy, so far as the land, and perhaps the town lot, is concerned, is clearly void, for want of identification of the property levied on.

On the facts above recited, however, the questions are raised which are to be decided.

It is insisted by Morgan & Co. and Eakin & Co., that the levy on the negro is void, because the legal title was conveyed to Savage, the trustee, and consequently did not operate to extinguish the debt under the general rule of law, that the levy on personal property sufficient to pay the debt is a satisfaction. Admitting the principle assumed to be correct, we can not hold it applicable to the facts of this case, as it appears in this record. So far as we can gather from the record, in the suit of Morgan &

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Co. and Eakin & Co., and of Dearmon, in his cross bill against them, all proper parties were before the Court. We would infer this, in favor of the regularity of proceedings before a court of general jurisdiction, nothing to the contrary appearing. We assume that as Savage, the trustee, was dead, another trustee was appointed in his stead, and that with all proper parties before the Court, the decree was made, ascertaining the debt due the defendants in this case, and ordering a sale of the negroes, the land and town lots; that the same parties were before the Court when, by consent, the execution of the decree from the Supreme Court was stayed, and additional security given and accepted by the parties, and the negroes agreed by all parties to be delivered to be sold in satisfaction of the debt, and if not delivered, that execution should issue. After the failure to deliver, an execution was properly issued, and properly levied on the property that had been decreed to be liable to the debt, and had been attached and advertised to be sold under the decree of the Court, that is, the negroes; and as the levy was made by complainants, on an execution issued in pursuance of a decree that directed the sale of these negroes for payment of their debt, we do not think they are in condition to say that it was wrongfully levied. No one could dispute their right to have the negroes sold for their debt, under the decree; nor did any one interpose any objection to the sale which would have paid their debt. They failed to have said property sold, or, at any rate, the Coroner failed to sell. We, therefore, hold, that, as the levy was properly made, and was upon sufficient property to satisfy their debts, they can not now proceed to

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enforce said debts on other property, to which complainants have acquired a title in good faith, as far as we can see; for we may assume that the parties themselves have misled the complainants into its purchase, by the fact that they sought the satisfaction of their debts out of the negroes.

It is clear that the Coroner had levied the execution on personal property sufficient to satisfy the execution, and that this was a satisfaction of the debt: *Evans v. Barnes*, 2 Swan, 292.

So far as we can see, there was nothing to prevent a sale of the property except the neglect of his duty by the Coroner. Upon the levy he became liable to the parties plaintiffs in the execution for the debt, the same being extinguished by the levy, as against the original debtor. Morgan & Co. and Eakin & Co. must look to the Coroner, on his official bond, for their debt: 2 Swan, 293.

This view of the case renders it unnecessary to examine the other questions discussed, and it disposes of the whole case made by the pleadings.

The Chancellor having taken this view of the case, we affirm his decree, and direct that the defendants, Morgan & Co. and Eakin & Co., pay the costs of this court, as well as the court below.

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MICAJAH HAMILTON and WIFE v. ROBERT V. GILBERT.

1. STATUTE OF FRAUDS. *Parol sale voidable.* A parol sale of land is not void but voidable.
2. VENDOR'S LIEN. *Parol Sale.* Upon a parol sale of land, executed, a vendor's lien arises.
3. SAME. *Notes executed to vendor's donee.* On a gift by the vendor, of the purchase money of land to a third person, to whom the vendee executes his notes, a lien exists in favor of such payee, for the price.
4. SAME. *Set-off.* Such note is not subject to a set-off of a debt of the donor.
5. FRAUD UPON CREDITORS. *Who may set up.* If such notes are made with intent to defraud creditors, the payor cannot set that up as a defence.

Cases cited: *Hilton v. Duncan*, 1 Cold., 320; *Sneed v. Bradley*, 4 Sneed, 304; *Dishmore v. Jones*, 1 Cold., 556.

FROM DE KALB.

Appeal from a decree of the Chancery Court at Smithville. JOHN P. STEELE, presiding.

JOHN H. SAVAGE, for Complainants.

R. CANTRELL, for defendants, cited: *Thompson v. Pyland*, 3 Head., 537; *Green v. Demoss*, 10 Hum., 371.

NELSON, J., delivered the opinion of the Court.

Malachi Cummings, the father of Mrs. Hamilton, verbally purchased, of Wm. M. Adcock, the tract of fifty acres of land, described in the record, at the price of one hundred dollars, and took and held possession thereof, and afterwards sold the same to defendant, for two hundred dollars. He owed a balance of nine dollars and in-

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terest, for which Adcock retained a lien, which was satisfied by Gilbert. Gilbert, at the instance of Cummings, executed two notes payable to Martha Jane Cummings, afterwards Mrs. Hamilton, for the payment of the residue of purchase money; one of said notes being for one hundred and the other for seventy-five dollars, and both falling due 25th December, 1859. The complainants brought suits, before a Justice, on the notes; but alleging that defendant is insolvent, they filed this bill to enforce the vendor's lien for unpaid purchase money. Defendant resists the relief prayed for on two grounds: first, that the notes belong, in fact, to Cummings, and that he has a valid set-off against them; and, secondly, that the complainants, as he alleges, do not stand in a position to enforce the vendor's lien.

The original contract between Cummings and Adcock, as well as the contract between Cummings and Gilbert, for the sale of land, was by parol; but it is shown, in evidence, that Adcock made the deed to Gilbert at the instance and request of Cummings, and in accordance with the verbal contract that he would make the title to such person as the latter might direct. Whatever doubts may formerly have existed on the subject, it may be regarded now as the settled law of this State, that "a parol contract for the sale of land, is not entirely void, but may be completed by the voluntary consent of the parties; and it has been laid down as the correct rule that, while the vendor is able and willing and ready to perform the parol agreement, the purchaser can maintain no action to recover back the consideration money paid." See *Hilton v. Dun-*

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can, 1 Cold., 320; *Sneed v. Bradley*, 4 Sneed, 304. These cases hold that the sale is voidable rather than absolutely void. There can be no doubt that if the purchase money had not been paid to Adcock, he could have enforced a lien for its payment; and as Cummings was the real vendor of Gilbert, and made a gift of the unpaid purchase money to his daughter, and caused the notes therefor to be executed to her, we can perceive no valid reason why she shall not be regarded in a court of equity as standing in the relation of vendor to Gilbert, the second purchaser. By the execution of the notes to her, she is subrogated to the rights of the actual vendor, and, as he caused Adcock to make the deed, stands in the same relation as if she had made the deed herself, and Gilbert, by executing the notes to her, is estopped to deny her equitable lien. This question was virtually determined in *Dishmore v. Jones*, 1 Cold., 556, 557, and it is unnecessary to restate the grounds upon which that case was decided.

It is insisted in the answer and there is evidence tending to show that the object of Cummings, in causing the notes to be executed to his daughter, was to defraud a certain creditor, or his creditors generally, by preventing a garnishment for the debt; but no creditor of Cummings' is before the Court; and if there was any intentional fraud in the transaction, Gilbert was a party to it, and can not be allowed to take advantage of his own wrong. As between the parties to this suit, the consideration of natural love and affection was sufficient to support the gift to the daughter; and if the father, afterwards, had possession of, or claimed the notes, this circumstance alone would not

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deprive her of a right which she had acquired by the voluntary assent of all parties.

It seems, that, when the conveyance was made to Gilbert, Cummings remained in possession of the land, for a year or two, under a contract to pay rent, and was turned out of possession at the suit of Gilbert, by a writ of unlawful entry and detainer. The facts do not very clearly appear in the record, but there is sufficient evidence to create a well grounded belief that this was not done until Cummings instituted legal proceedings against him and recovered damages for the seduction of one of his daughters, who, it seems, was, for a time, an inmate of Gilbert's family. The circumstances indicate that the account against Cummings for wheat, salt, bacon, coffee, and other supplies for his family, as well as the claim for rent, originated during the progress of this illicit intercourse, and compensation therefor would not, in all probability, have been demanded, but as a consequence of the suit for seduction. Be this as it may, the account of Gilbert against the father is not, in law or equity, a legitimate set off against the claim of complainants.

The decree of the Chancellor will be reversed, and a decree pronounced in favor of complainants for the amount of the two notes, with interest and costs, which shall be declared a lien upon the land, to be enforced by a sale in the usual manner.

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BANK OF TENNESSEE.

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CHANCERY JURISDICTION.

1. *Account.* A bill in equity lies for an account of goods sold on commission, if the transactions are complicated, or if there be embarrassment in making proof, though the items are all on one side. *Taylor v. Tompkins*, 89.
2. *Conflict of, in Chancery Courts. Cross bill.* Creditors, by final decree in Chancery, can not, by reason of such decree, obtain jurisdiction for that Court, by cross bill to such ended suit, to attack a decree for divorce and alimony rendered in a Chancery Court for another Chancery District. *Smith v. Johnson*, 225.
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CHANCERY JURISDICTION—*Continued.*

4. *Same. Dismissal for want of jurisdiction.* A decree, based on such a bill declaring the decree for alimony void, is erroneous for want of jurisdiction. Dismissed without prejudice. *Ib.*
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6. *Same. Same.* If such are valid defenses against the judgment, the way to make the defense was by *error coram nobis*. *Ib.*
7. *To enjoin judgment at law.* Where one of the makers of a note to which complainant's name was forged, sent him word by the Sheriff, who served the writ, that he was not to be troubled, but the others would pay it; complainant having no previous knowledge of the existence of the note, then denied his liability, and avowed his determination to resist it, but was told by the Sheriff that he need not attend at the first term; was sick at the return term, and was thereby prevented from employing counsel; the other defendants employing counsel, and putting in pleas for all, but at the same term withdrawing the pleas, and allowing judgment to go against all, plaintiff being aware of the forgery of complainant's name; it was held that complainant was not guilty of such negligence in making his defense as would preclude him from setting aside the judgment at law by bill in equity. *Rowland v. Jones*, 321.
8. *Relief against judgment at law. Excuse for not defending.* Suit was brought on a bill against maker and indorser, and judgment by default, the indorser having no knowledge of an unauthorized disposition of the bill, and believing that it had passed according to the condition on which it was to be used. Held, sufficient ground for relief in equity, there being no plea, demurrer or motion to dismiss. *Hickerson v. Raiguel*, 329.

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9. *Will. Fraudulent judgment.* A court of equity will set aside a verdict and judgment of the Circuit Court, had upon an issue *devisavit vel non* against a will, if it appear that such verdict and judgment were obtained by fraud. If, in such case, the will has already been probated in common form, the court will reinstate such probate. *Smith v. Harrison*, 230.

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11. *Reinstating probate. Remanding for re-trial of issue devisavit vel non.* While a court of equity is not the forum to try an issue *devisavit vel non*, yet, upon a bill to reinstate the probate of a will alleged to have been set aside by a fraudulent judgment, it will take cognizance of the *factum* of the will itself, in adjusting the equities of the parties, to determine whether their equities demand a re-trial at law or a reinstatement of the former probate, but not to determine the validity of the will itself. *Ib.*
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CHANCERY PLEADING.

1. *Newly discovered proofs. Averments.* A bill to enjoin a judgment at law, on the ground of newly discovered testimony, showing payments which should have been allowed on the debt, which states, generally, that complainant did not know he could make this proof until after the judgment and adjournment of the Court; that he used all diligence to get this proof, but did not succeed until after the trial, is not sufficient on demurrer, without stating the facts specifically. *Levan v. Patton*, 108.
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3. *Answer as cross bill.* An answer filed as a cross bill, must be accompanied by a bond for costs, or by issue of process, to become operative as a cross bill. *Keele v. Cunningham*, 288.
4. *Evidence. Notice of assignment.* An assignment of a chose in action can not be attacked on appeal, for want of notice to the debtor or trustee, when no such issue is made in the pleadings. *Kelly v. Thompson*, 278.
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- sale, states specific objections to the title of the vendors, and does not call upon them to deraign title, but only to meet the specified objections, the answer will be sufficient, if it meets the allegations in the bill, without exhibiting the title deeds. *Mullins v. Aiken*, 535.
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 9. *Same. Excuse for not making defense.* In the same bill, the excuse for not making defense held to be sufficient, was, that the case was reached and tried at the first term after the war, at which term the Court, after an interval of several years, was reorganized, the defendant being absent, and not represented by counsel, and being old and infirm, and living in another county, and social order not being restored. *Ib.*
 10. *Fraud. Judgment by undue advantage.* To take judgment under the the circumstances, was to obtain an undue and unconscientious advantage. *Ib.*
 11. *Former suit.* A general bill is a bar to a particular bill; as a bill filed by the distributees of an estate against the administrator, to charge him with a *devastavit*, is a good bar to a bill afterwards brought by a creditor for the same *devastavit*. *Green v. Neal*, 217.
 12. *Same. Practice on plea.* Upon a plea of another action pending in equity, it is proper practice to refer the plea to the Clerk and Master, to report whether the suits are for the same cause of action. *Ib.*
 13. *Same.* Plea of another action pending need not be sworn to. *Ib.*

CHANCERY PLEADING AND PRACTICE.

1. *Parties. Officers, principals and agents. Decree without process.* A bill filed to enjoin proceedings on a judgment and execution, must make the plaintiff in the execution a party. If it be filed against the officer having the execution, and an agent of the plaintiff, jointly with the plaintiff, but no process issue against the plaintiff, a judgment *pro confesso* and a decree against him will be void, and will be reversed as to all, and the cause remanded. *Blanton v. Hall*, 423.

CHANCERY PRACTICE.

1. *Parties. Petition in cause making complainants. Consolidation.* A bill was filed by a vendor of lands against the representatives of the deceased purchaser, who were brought properly before the Court, but the lien had been waived. An owner of part of the purchase money, to whom the purchaser had executed a note, came in by petition *ex parte*, and was made co-complainant. A creditor of the vendor, having attached the interest of the vendor, attacking the sale as fraudulent against creditors, had his bill consolidated with that of the vendor, upon petition. Held, that, as the vendor had no lien, his assignee could be subrogated to nothing; that the creditor, not having made the heirs and representatives of the purchasers parties to his bill, all of them being minors, the Court did not, by the order of consolidation, obtain jurisdiction of them as to his suit, and could have no relief against the land, nor against the fund, which his debtor had failed to recover. *Brevard v. Summar*, 97.
2. *Appeal. What open on.* A decree in such case having been made for the sale of the land, to pay the debts of the first petitioner, the creditor, who had a decree below for the balance of the fund coming to the vendor, if any, appealed. The Court reviewed the whole decree, and held it erroneous. *Ib.*
3. *Publication.* Practice adopted in an alimony suit, making publication for creditors to come in and file claims, approved. *Smith v. Johnson*, 226.
4. *Plea. Setting down for argument.* A motion to strike out a plea in equity, is equivalent to setting it down for argument. *Brevard v. Summar*, 97.

Dismissal without prejudice. See CHANCERY JURISDICTION, 4.
5. *Election.* A defendant in equity who has required the complainant to elect which of two suits he will proceed in, and has obtained a dismissal of a suit at law on such election, will not be allowed to object to the jurisdiction in equity. *McBroom v. Wiley*, 58.
6. *Revivor. Revivor in futuro, on producing letters before the C. & M.* A revivor was made in this case before qualification, in the name of such person as may be qualified as administrator, from and after the filing of the letters. *Allen v. McCullough*, 174.
7. A revivor of a decree by consent, precludes a defense against it, accruing after the decree, and before the consent order. *Ib.*
8. *Infant. Consent as to.* An agreement made in the progress of a cause, clearly for the benefit of infants, may be the basis of a decree, without a reference, to report whether it is beneficial. *Ib.*

Appeal. Time to take oath. See APPEAL, 11.

CHANCERY PRACTICE—*Continued.*

9. *Decree for sale.* No sale of lands will be decreed to pay off vendor's lien, until the amount is ascertained. *Denny v. Steakly*, 156.
10. *Decree of sale. To bar redemption.* A sale of land, without redemption, ordered by a decree which does not show that the credit is allowed on application of the complainant, is void, and will, on appeal taken after it is made and confirmed, be set aside, and a re-sale ordered. *Carter v. Sims*, 166.
11. *Decree over. Against trustee for fund misapplied.* All the parties being before the Court on a bill filed by the surety of the maker, to enjoin a suit for the debt, to be released from the debt, or to apply the money received by a trustee to the payment of a mortgage debt, a decree is proper in favor of the holder against the surety of the maker for the balance of the debt, with a decree over in favor of the surety against the trustee for the amount misapplied. *Loughmiller v. Harris*, 553.

See CONFEDERATE TREASURY NOTES, 6. TAX SALE, 5.

CHANCERY SALE.

1. *Estoppel as to parties petitioning for the sale. Relief as to whom.* On a bill filed by heirs to set aside a sale of land, made under the order of a County Court, upon application of two of the heirs as administrators of the estate, they, with some others, being of age, and others being minors, the Court hold that they would be bound to repel the administrators if they sued alone; but, as the others are not culpable, the Court are bound to declare the sale void *in toto*. *Martin v. Turner*, 384.
2. *Confederate Treasury notes. Value of. Applied to debts.* The price being paid in Confederate Treasury notes, which were applied in payment of the debts of the estate, it was held that the purchaser should be reimbursed the value of the currency paid, estimated in U. S. Treasury notes, with interest. *Ib.*
3. *Price a lien. Account, how adjusted. Time to pay in, money.* The value so charged, with meliorations charged and rents credited, is held to be a lien on the land, and sale ordered for their satisfaction, unless paid in a reasonable time. *Ib.*
4. *Effect of estoppel as to petitioner.* The surplus, after paying charges, decreed to the heirs, excluding the two administrators. *Ib.*
5. *Petitioners to pay costs.* The administrators personally charged with all costs. *Ib.*
6. *Of personalty. For distribution. Confirmation.* Upon a sale of slaves, made for distribution of the proceeds to the distributees, under the orders of a County Court, the sale was not binding until confirmation.

CHANCERY SALE—Continued.

The title did not pass to the purchaser, and the property was not at the purchaser's risk. *Johnson v. Johnson*, 521.

- 7. *Delivery. Surety. How affected by act of principal.* If delivery is material to the risk, the election of the purchaser to take possession and assume the risk, could not fix the liability of his sureties for the price, unless they assented to his act. *Ib.*
- 8. *Possession. How construed.* Where one of three purchasers of slaves was administrator, and all were distributees, and they had possession of all the slaves after the sale, and the administrator took them South for preservation during the war, with the consent of another one of the purchasers, but it did not appear whether they held them as purchasers or as distributees, it was held that this did not bind them as purchasers to the loss of the property, or to the consequences of a conversion. *Ib.*
- 9. *Purchase money. Collection before due. In Confederate or bank notes. Liability of Commissioner.* A Commissioner to sell land, receiving the amount of a sale note before it is due, deducting interest, in Confederate notes or bank notes, without an order of Court to do so, but by authority of the administrator, on whose application the land was sold to pay debts and for distribution, held liable only for what he received, if still in his hands, or if used by him, for its market value when received. *Touchstone v. Touchstone*, 513.
- 10. *Commissioner. To sell, may receive payment.* A commissioner to sell land, with authority to take notes payable to himself, has authority to receive payment of the notes taken, when they fall due. *Matthews v. Thompson*, 588.
- 11. *Same. Same. Confederate notes.* Where the commissioner, in good faith, received payment in Confederate notes, and submitted to a decree against him for the amount, in dollars, it was held to be a good payment as to the purchasers, and that they were discharged. *Ib.*

See COMMISSIONER.

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COMMISSIONS.

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See AGENT, 1.

CONDITION.

See BILLS AND NOTES, 1.

CONFEDERATE TREASURY NOTES.

1. *Returned in course of dealing to the party who once held them.* Confederate money having been collected and paid into the office of the Clerk of the Court, the plaintiff refusing to receive it, the defendant, Young, applied to borrow it, and gave security, when the plaintiff said if they were *mind* to take it, it was all right, * * * but he would not take the money; thereupon Young took the money and executed the note sued on, with surety. Young had previously paid the same money to the defendants in the execution, they paying it

CONFEDERATE TREASURY NOTES—*Continued.*

to the Sheriff, Young received it again as a loan. Held, that he and his surety were liable for the full amount of the note. *McBroom v. Wiley*, 58.

2. *Promise to take back.* A payment in Confederate Treasury notes, voluntarily received and credited on a note, will not be set aside because of a subsequent promise, without consideration, to "take it back." *Vance v. Smith*, 344.
3. *Account for value.* Where Confederate Treasury notes were received when they had a value, and retained, without showing what became of them, the party will be held to account for the value of the notes. *Bogle v. Hammons*, 137. See *Martin v. Turner*, 384.
4. *Tender of, back.* A failure to tender back Confederate notes, when they were of no value whatever, can not materially affect a party's right. *Ib.*
5. *Account for notes used.* A party taking Confederate Treasury notes, and using them, must account for the amount realized for them. *McCartney v. Wade*, 369.
6. *Same. Decree against borrower.* Where a complainant on whom Confederate money had been imposed by duress, loaned it to another, and that other used it in payment of his debts, and made no complaint of it, all the parties being before the Court, the decree was entered in favor of the complainant against the party to whom he had loaned the money, and as to so much, the payment to complainant was held good. *Ib.*
7. *Payment in. How valued.* A payment unlawfully made in Confederate money, used by the payee, will be allowed for at its marketable value at the time it was received. *Jackson v. Collins*, 491.
8. *Post-office check.* A post-office check on the Confederate States, taken in payment, the holder, failing to collect, would only be entitled to recover the value of what he would have received on the check; *i. e.*, the number of dollars called for, in Confederate notes. *Denny v. Steakly*, 156.

Plea of. See PLEADING, 7.

See CHANCERY SALE, 2, 9, 11. DURESS, 2, 3. AGENCY, 7.

CONFEDERATE SOLDIERS.

Not a duty to desert. A Confederate soldier, hired as a substitute for a conscript, was not under any obligation to desert, and incur the penalty of desertion. *Gunter v. Putton*, 257.

CONFIRMATION.

See CHANCERY SALE, 6.

CONSENT ORDER.

See CHANCERY PRACTICE, 7, 8.

CONSIDERATION.

See ADVANCEMENT. GUARANTY. HUSBAND AND WIFE, 8. INTEREST, 4.

CONSOLIDATION.

See CHANCERY PRACTICE, 1.

CONSTABLE'S RECEIPT.

See EVIDENCE, 14.

CONSTITUTIONAL LAW.

1. *Legislature. Special session.* By art. 3, s. 8, of the Constitution, the General Assembly, at a special session, is prohibited from entering upon any legislative business except that for which they were especially called together. *Davidson v. Moorman*, 575.
2. *Redemption. Extension by Act of 1861, void.* The act of June 28, 1861, c. 20, s. 2, providing that debtors or *bona fide* creditors shall have three years in which to redeem real estate sold, having been passed at an extra session, and that not being the business for which they were called together, is void. *Ib.*

See BANK OF TENNESSEE, 3.

CONSTRUCTION.

See CONTRACT, 4. CONVEYANCE, 1. RECORD, 5.

CONTESTED ELECTION.

See ELECTION.

CONTRACT.

1. *Unsigned by one party. Effect.* A covenant to pay money, the price of a negro, signed by the buyer, containing a stipulation to make a bill of sale at the time of the payment of the purchase money, evidently intended to bind the sellers, but not signed by them, is the covenant of the vendee only. *Officer v. Sims*, 501.
2. *Same.* If such covenant had been signed by both parties, it only bound the vendor to make the bill of sale when the money was paid; and so was not a dependant covenant. *Ib.*
3. *Dependent covenants.* If such covenant were dependent, an averment of readiness to perform at the day; the power then existing to make an effective bill of sale; would be sufficient, though at a subsequent time, and before suit brought, property in slaves was destroyed by the amended Constitution. *Ib.*

CONTRACT—*Continued.*

4. *How affected by the law.* The liability of the stayor is assumed in view of the existing law, and the issue of an execution before the end of the eight months in a case provided for by the law, is not a violation of the contract, but in conformity with it. *Rothchilds v. Forbes*, 13.

See DURESS, 1. STAY.

Of husband to pay deceased wife's debt. See HUSBAND AND WIFE, 8.

CONVEYANCE.

1. *Construction.* In the construction of a conveyance the intent of the parties is to prevail. Present words of conveyance in the former part of the instrument may be controlled by after portions of the same. *Kissom v. Nelson*, 4.
2. *Grant. Assignment of.* Assignment of a grant by indorsement and delivery is not a mode of conveyance known to our law, and does not transfer the title, legal or equitable, or give a right to a specific execution. *Holcomb v. Canady*, 610.

See JUDGMENT, 9. CHANCERY SALE, 6

COSTS.

Bond for. See CHANCERY PLEADING, 3.

1. *Sheriff's cost on compromise of attachment suit.* A Sheriff who has levied an attachment becomes, on payment or settlement of the case, entitled to commissions, at the rate allowed upon executions, to be computed upon so much as is realized by the plaintiff from the defendant by payment or satisfactory settlement. *Shaw v. Armstrong*, 420.
2. *Same. Same.* Where, after levy, the defendant became bankrupt, and the plaintiff agreed to take \$500 and release the attachment, and prove his debt in bankruptcy, the Court allowed commissions on the \$500, but refused it on what might be subsequently realized in bankruptcy. *Ib.*
3. *Set-off.* A defendant pleading and sustaining a set-off is entitled to recover the cost of the set-off. *Maupin v. Whitson*, 1.
4. *Judgment for.* Judgment for costs, erroneously entered, may be corrected at a subsequent term. *Ib.*
5. A Clerk will be deprived of the costs of a transcript, "for irregular arrangement and general confusion." *Bass v. Shurer*, 216.
6. *Successful party. Discretion as to costs.* A plaintiff, obtaining a judgment for less than he claimed before a Justice of the Peace, took the case by *certiorari* to the Circuit Court, where the judgment of the Justice was affirmed. Held, that he was not entitled to recover the costs of the *certiorari*. *Williams v. Cosby*, 644.

COUNTY COURT.

See JUDICIAL ACTS. APPEAL, 1, 2. PARTITION.

1. *Jurisdiction of. Legacies and filial portions.* The County Court has no jurisdiction of a petition filed against an executor or administrator, with the will annexed, to recover a legacy of specific amount, \$100, admitted to be in his hands and due, but which he insists he has paid, and on which a contest is made over the validity of the payment. *Bowers v. Lester*, 456.
2. *Partition. Jurisdiction of.* The County Court has no jurisdiction of a case of partition where it is necessary as a preliminary to settle the title. *Dean v. Snelling*, 484.
3. *Jurisdiction. Objection to, waiver.* The rule that the filing of an answer in the Chancery Court is a waiver of objections to the jurisdiction, to decree upon matters properly of legal cognizance, has no application to the jurisdiction of the County Court. *Ib.*
4. *Same. Same. Partition.* An answer to a petition for partition in the County Court, does not waive an objection to the right of the Court to try and adjudge title; but the petition will be dismissed at the hearing. *Ib.*

Minutes not signed. See RECORD.

Judgment of. See PLEADING, 2.

COVENANT.

See CONTRACT. ELECTION, 1, 4.

CREDITOR.

See DEED. FRAUDULENT CONVEYANCE, 4, 5. TRUST, 10.

CROSS BILL.

See CHANCERY JURISDICTION, 2. CH. PLEADING, 3.

DAMAGES.

See JUDGMENT, 1, 2, 3. MISTAKE, 4. SALE. BILLS AND NOTES, 2.

DECLARATIONS.

See EVIDENCE, 7, 8. WILL, 4.

DECREE.

See CH. PL. AND PR., 1, CH. PR., 7, 8, 9, 10.

DEED.

See FRAUDULENT CONVEYANCE. MISTAKE.

1. *Of Trust. Presumption of acceptance.* On the conveyance of property in trust for creditors, the presumption of acceptance arises, and the

DEED—Continued.

property vests in the trustee, irrevocable by the grantor, to await the election of the beneficiaries. *Farquharson v. McDonald*, 405.

2. *Same. Repudiation of deed.* A distinct and unequivocal act of repudiation of a deed by a beneficiary in it, will operate as an estoppel to claim a benefit under it. *Ib.*
3. *To heirs of a person living.* A deed conveying land, *in presenti*, to the heirs of a person living, vests the title in the children, then *in esse*, of that person; after-born children do not take. *Grimes v. Orrand*, 298.
4. *Construction. To pay creditors, means existing creditors.* A deed providing for the payment of all creditors, and disposing of the surplus to third persons, provides for debts only which existed at the making of the deed. *Vance v. Smith*, 344.

See CONVEYANCE, 1.

DELIVERY.

See CHANCERY SALE, 7.

DEMURRER.

See PLEADING, 5.

DEPENDENT COVENANT.

See CONTRACT, 2.

DEPUTATION.

See SHERIFF.

DESCENTS.

1. *Mother, when the heir.* Lands descended from the father of an intestate who dies unmarried, without brothers or sisters, or the issue of such, will descend to the mother, if living. *Towls v. Rains*, 355.
2. *After-born brothers and sisters.* After-born brothers and sisters, unless "born within the period fixed by law," do not take an interest in the estate of a deceased brother. *Grimes v. Orrand*, 298.

DESCRIPTION.

See TAX SALE, 2. SPECIFIC PERFORMANCE, 3, 4.

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See CONFEDERATE SOLDIER.

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See CH. JURISDICTION, 9,
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DISCOUNT.

See INTEREST, 1, 3.

DISCOVERY.

See EVIDENCE, 12.

DISTRIBUTION.

See SLAVES.

DIVORCE.

For cause existing at marriage. It seems that, under the Code, 2448, a divorce may be granted, declaring the marriage void *ab initio*, for three out of the nine causes. *Allen v. McCullough*, 174.

See HUSBAND AND WIFE, 5, 6.

DURESS.

1. Where personal fear is aroused by threats, so as to compel a person to make a contract, or do any act, which he would not otherwise have done, such contract or act, is utterly null and void. *Bogle v. Hammons*, 137.
2. *Fraud.* Where a deed for land was obtained, for Confederate Treasury notes, during the war, by a substitute in the Confederate army, by repeated threats of bringing the soldiery upon the maker, there being a military order against refusing to take the notes, and by statements that the penalty of refusing was hanging, and by promises to take the money back, or make it good as gold and silver, if it did not answer all purposes, it was set aside for duress and fraud. *Ib.*, 136.
3. *Confederate notes taken under.* A party receiving a payment in Confederate money, under the pressure of threats of immediate military arrest, which, under the circumstances existing, could, and probably would have been executed, will be relieved from the payment. *McCartney v. Wade*, 369.
4. *Declarations made under.* Declarations that he had acted voluntarily, made by the party while the circumstances still existed, and properly attributable to the fear and apprehension under which he previously acted, will not preclude the right of the party to relief. *Ib.*

EJECTMENT.

See CHAMPERTY, 2.

ELECTION.

1. *Of revenue collector. Contest. Jurisdiction of.* In the absence of any specific provision as to the jurisdiction of a contested election, a court having the power to induct an officer, has the power to determine the

ELECTION.—*Continued.*

validity and truth of the return of his election. The County Court having the power to induct a Revenue Collector, is the proper jurisdiction before which a contested election lies as to that office, there being no express provision for a contest elsewhere. *Blackburn v. Vick*, 377.

2. *Contest. The remedy, when.* If a party take an office under color of an election, the only remedy for the party who is really elected is by a contest. *Ib.*
3. *Mode of proceeding. Statement and issue.* The contestant should file, after due notice to the adverse party, in the court where the contest is to be made, a clear statement of the grounds on which he proposes to contest the election of his opponent, presenting grounds for an issue of law or fact. To this the defendant should reply, so as to raise a question of law or fact. *Ib.*
4. *Same.* It is the duty of the Circuit Court, on an appeal in such case from the County Court, to see that proper issues are made up, hear the evidence, and determine the rights of the claimants to the office in controversy. *Ib.*
5. *To be tried on the merits.* A judgment against a contestant, on appeal from the County to the Circuit Court, without trial on the merits, that he pay all the costs but the costs of defendant's witnesses, is erroneous, where the court has jurisdiction of the contest. *Ib.*

ELECTION.

See CH. PR., 1, 4.

EMANCIPATION.

Time of, Emancipation took place in February, 1865, by the Act of the State Government. *Johnson v. Johnson*, 522.

ERROR.

When the writ lies. See STATE.

1. *Evidence of established or immaterial facts.* The admission of incompetent evidence to prove facts otherwise fully established, and uncontroverted, is not a ground of reversal. So of the admission of immaterial facts not calculated to affect the jury. *Planters Bank v. Massey*, 361.

See WILL, 5.

2. *When a ground of reversal.* Where there is error in the admission of evidence, or in the charge, it is not enough to avoid the reversal that there is sufficient evidence to support the verdict, aside from that which is objected to. It must appear that no injury could have been caused by the error. *Clark v. Rhodes*, 206.

ERROR.—*Continued.*

3. *Verdict. On doubtful proof.* A doubt as to the correctness of a verdict does not authorize a reversal in the Supreme Court, in a civil case; but it imposes upon the Court, more imperatively, the duty of scrutinizing the incidents of the trial, and the other errors assigned in the record. *Hackett v. Brown*, 264.
4. *Verdict. Effect on facts.* A verdict may be regarded as settling questions of fact as to which there is conflict of proof. *Wright v. Win-ningham*, 254.
5. *Evidence. Impeaching a witness.* It is error to charge that when the credit of a witness is questioned, you try it as you would any other fact in the case, without stating the rules by which it is tried more fully. *Hackett v. Brown*, 264.
6. *Charge of Court. Must apply to the facts.* A Court must charge the jury, not in remote and impalpable generalities, but as applicable to the facts, so as to aid the jury in arriving at a correct conclusion. *Ib.*
7. *General charge, how affected by refusal to charge on particular point.* A general instruction, that the jury may look to all the facts and circumstances, may be restricted in its effect by a request for a specific instruction, that a particular fact may be looked to, and a refusal of the Court so to charge. *Ib.*
8. *Nul tiel record.* It is error to submit an issue of *nul tiel record* to a jury; but if they find as the Court would have found, it is not a material error, for which this Court will reverse. *Coffee v. Neely*, 304.
9. *Writ in Chancery. How far defendant in error may take benefit under.* A writ of error in a Chancery proceeding brings up the case so far that compensation denied below to an agent, defendant, may be allowed in the Supreme Court, upon error prosecuted by the principal, the complainant, in a case seeking a recovery and account in the matter of the agency. *Wood v. Cooper*, 441.

ERROR CORAM NOBIS.

See CH. JURISDICTION, 5, 6.

ESTATES.

See SHELLY'S CASE.

ESTOPPEL.

See CH. SALE, 1, 4. DEED, 2. SALE, 5. TRUST, 9.

EVIDENCE.

See ERROR, 1, 2, 3, 5.

1. *Declaration of deceased guardian.* The declarations of a deceased guardian as to a transaction, not made as part of the *res gesta*, are not admissible to establish a right in his wards. *Keele v. Cunningham*, 288.

EVIDENCE—*Continued.*

2. *Declarations made after the deed.* Declarations of the maker, or of the trustee of the deed, prejudicial to its validity, made subsequent to the making of the deed, are inadmissible in evidence to affect the beneficiaries in the deed. *Vance v. Smith*, 344.

Declarations. See WILL, 4. Made under duress. See DURESS.

Admissions. See WILL, 5.

3. *To discredit witness.* A witness cannot be impeached by showing trivial discrepancies as to collateral matters, nor by proving that others were present and did not hear what he states to have been said, nor by loose conversations, seemingly at variance with his evidence, to which his attention has not been properly called. *Bogle v. Hammons*, 137.

4. *Witness.* The fact of a witness releasing an interest, is a circumstance to show his leaning. *Sandford v. Weedon*, 71.

5. *Relevancy.* Where a plaintiff captured during the war, was permitted to prove what prisoners in particular prisons endured, without any proof that he was kept at such prisons, the evidence was held irrelevant, and its admission error. *Wright v. Winningham*, 254.

Must follow pleadings. See CH. PLEADING, 4.

6. *Means of payment, as relevant to payment.* On a question whether a certain payment was made, it is admissible for the payor to prove that he had the means to pay, as a circumstance; as that he sold certain property to raise the money to pay the particular debt. *Planter's Bank v. Massey*, 360.

7. *Declarations to explain acts.* To admit the statement of a payor at the time of the sale and receipt of money, as to the purpose for which he was raising the money, is not error. *Ib.*

8. *Declarations in presence of agents of adverse party.* Where the payor, in the presence of the payee's agent who was receiving the money, borrowed money to make up a deficiency, what he said at the time in the presence of the agent is admissible, as a circumstance going to show the payment. *Ib.*

9. *Proof of payment. What admissible.* On a suit upon two bills of exchange, as lost bills, these facts were held admissible to prove payment: that a party to the bills of exchange, which were then in the hands of a particular person, after circumstances tending to show a payment of money, came out of a room, and in the presence of the holder, with two bills of exchange in his hand, spoke of them as paid; showing them to witness, who saw that they were bills, and that one of the bills had the name on it of a party whose interest the witness was looking after, and the other had another name, which names agreed with those on the bills in question; there being no

EVIDENCE—*Continued.*

proof that there were any other bills but those in question made by the parties, or in hands of the person to whom the payment was alleged to have been made. *Ib.*, 361.

10. *Same.* The subsequent possession of bills of exchange by the payor, somewhat vaguely described, and of their destruction by burning, were also held to be circumstances proper to be left to the jury. *Ib.*
11. *Testimony of deceased witness.* A witness called to prove the testimony of a deceased witness on a former trial, is competent to testify, if he remembers the substance of what the deceased witness swore on a particular subject, though he does not profess to know his testimony on other points. *Ib.*
12. *Practice. Petition for discovery.* A party filing a petition for discovery, has no right to read his petition in connection with the answer, unless it is necessary to a proper understanding of the answer, and it is error for the Court to allow the reading of such petition, although he instructs the jury at the time it is not evidence. *Lancaster v. Arendell*, 434,
13. *Same.* In jury trials, evidence not properly admissible should, if possible, be excluded *in limine*, so that it may not be heard by the jury. *Ib.*
14. *Grade of, to establish fraud. Chancery.* In a court of law, as in a court of equity, fraud may be established by circumstances; but in the former, a higher degree of presumptive evidence is required. *Smith v. Harrison*, 230.

Quantum of. See TRUST, 7, 11, 12. WILL, 3.
15. *Handwriting. Comparison. Writings not in the cause.* Other writings than the one sued on can not be introduced in evidence for the purpose of comparison of handwriting by the jury, or by the witnesses. *Clark v. Rhodes*, 206.
16. *Constable's receipt.* A Constable's receipt to a surety for moneys due upon a judgment, is not evidence of its payment, as against a purchaser from the principal judgment debtor, or, it seems, against the debtor himself. *Brevard v. Summar*, 97.
17. *On former trial.* To prove the testimony of a deceased witness on a former trial, a witness is not competent, who states that he does not remember that the deceased was examined on the former trial, but he remembers that he heard all the evidence in that trial, and if he was examined, he heard him; that he was examined in another cause, and he remembers his testimony in that cause, and that if he was examined on the former trial, his testimony did not vary from his testimony in the other cause. Nor can he be heard, after proof *aliunde*, that the deceased was examined on the former trial. *Kinnard v. Willmore*, 617.

EVIDENCE—*Continued.*

18. *Of character.* In a civil action, involving moral turpitude, where the evidence is circumstantial, the defendant may introduce evidence of his good character. *Henry v. Brown*, 213.
19. *Secondary. Admission of.* The admission of secondary evidence is a preliminary matter for the Judge. It may be allowed, upon a reasonable presumption that the primary evidence is lost. *Anderson v. Maberry*, 653.
20. *Same. Proof to admit. Custodian.* That a paper was left by a party at his home, when he left home during the war; that he is informed, and believes, that it was destroyed by his wife; that he has made diligent search, and cannot find it; that he is assured by his wife that she burned it, is sufficient evidence of loss or destruction to admit secondary evidence. *Ib.*
 Proof to admit. See LOST INSTRUMENT, 2.
21. *Witness. Incompetency for want of religious belief.* A witness may be shown to be incompetent for want of religious belief, either by an examination on *voir dire*, or by proof of his declarations on the subject, at the option of the party seeking to exclude him. *Ib.*
 Admission of, when error. See ERROR, 1, 2.
 Parol, to contradict deed. See FRAUDULENT CONVEYANCE, 5.
 Parol, to prove contents of lost paper. See LOST INSTRUMENT, 2.

EXECUTION.

1. *Stay of. Fi. fa. on affidavit. Against whom.* The plaintiff in a judgment before a Justice of the Peace, on which the execution has been stayed, if he procure an execution under the Act of 1846, c. 216, s. 2, Code, 3065, upon affidavit of insolvency, etc., of stayor, and failure of defendant to justify, etc., is entitled to an immediate execution against both the principal debtor and the stayor. *Rothchilds v. Forbes*, 13.
2. *Same. Act of 1861.* A stay, under the Act of 1861, c. 2, ss. 1, 2, 3, of execution on a judgment rendered more than eight months before its passage, and on which a stay had been allowed, which had expired, was unauthorized and void. *Noel v. Scoby*, 20.
 See STAY.
3. *Sheriff's sale. Remainder, how levied on.* A remainder interest must be levied on and sold as such, and will not pass by a levy in general terms. *Kissom v. Nelson*, 4.
4. *Exemption.* An ass is within the meaning of the law exempting from execution "a horse, mule or yoke of oxen." *Richardson v. Duncan*, 220.

EXECUTION—*Continued.*

5. *Levy. On property conveyed to trustee, but decreed to be sold. Satisfaction.* A debtor made a deed of trust, to secure several creditors, with a power to himself to sell and apply to the purposes of the trust. In August, 1860, he sold a house and lot, and in 1863 collected and applied the proceeds to a particular debt. In a litigation as to another debt, a decree was obtained in 1862 ~~to sell~~ certain lands and negroes, which had been conveyed by the deed, to pay \$962.48; with authority to the Clerk to attach the negroes, if not delivered; and the Clerk having taken and being about to sell the negroes, by consent decree the sale was postponed for six months, on an agreement that on failure to deliver, execution should issue against the debtor and several sureties. On the expiration of the time, execution issued, and was levied on the negroes and lands. Held, that, though the negroes were conveyed to the trustee, on the decree for the sale of them and the agreement that execution should issue on failure to deliver the negroes, the execution issued could properly be levied on the negroes, and that the levy operated as a satisfaction as to the purchaser of the house and lot, and that the creditor was precluded, (the Coroner having failed to sell the negroes,) from questioning the sale to him. *Sewell v. Morgan*, 672.

See JUDGMENT, 1, 3, 4, 6.

EXECUTOR.

1. *Before probate. Sale by. Fraud.* A sale made by a person as executor, when he has not proved the will, or qualified as executor and given bond, he withholding the facts fraudulently, is void. *McLean v. Houston*, 37.
2. *His duty to propound the will. Trust, breach of.* It is the duty of an executor to propound the will and sustain it, or relinquish his trust. If it be contested, it is his duty to defend it by counsel and by proof. If he combine with the contestants to defeat the will, it is a breach of trust on his part, and a verdict and judgment against the will thus obtained are fraudulent and void. *Smith v. Harrison*, 230.
3. *Bond of. Trusts of the will.* Under the Act of 1838, c. 111, s. 18, the sureties of an executor are liable for the performance of the trusts created by the will, whether such as relate to the office of executor, or continuing trusts, relating to the preservation and management of the property for the benefit of devisees for life, and remainder-men. *Lester v. Vick*, 476.
4. *Will. Loan. Investment.* Where a will directs a trustee to keep a fund loaned out, there is no authority for investing it in real estate. *Ibid.*

EXEMPTION.

See EXECUTION, 4.

FEME COVERT.

See HUSBAND AND WIFE.

FORMA PAUPERIS.

See APPEAL, 11.

FORMER SUIT.

See CHANCERY PLEADING, 11, 12, 13.

FORMER TRIAL.

See EVIDENCE, 17.

FRANCHISE LAWS.

See JURY.

FRAUD.

1. *What is. Judgment obtained by.* Where the plaintiff in a suit at law, knowing that his note was a forgery as to one defendant, yet permitted the other defendants to withdraw the pleas, and took judgment by default in the absence of the defendant whose name was forged, it was held to be a fraud in obtaining the judgment, such as would entitle the injured defendant to set aside the judgment by bill in equity. *Rowland v. Jones*, 321.
By withholding facts. See EXECUTOR, 1.
2. *A defense at law.* Fraud may be pleaded at law in defense to a sealed instrument. *McLean v. Houston*, 37.
3. *Same.* If not otherwise pleadable, it could be done by way of set-off, or cross action. *Ib.*
4. *Same. Excuse for non-return of slave.* If it were necessary to aver a return of the property, the fact that "the slave, (the property in question,) had gone off and become practically free," and that the defendant was disturbed in his possession of said slave, who became a freeman," was not sufficient excuse. *Ib.*
5. *Pleading. Fraud. Return of property.* It is not necessary, where a person sets up fraud in a sale, that there should be an averment of the return of the property. *Ib.*
6. *Plea of. What is.* A plea that, owing to political prejudices, the plaintiff could not attend to his defense in Kentucky without endangering his life, and that the plaintiff fraudulently combined with the citizens of Kentucky, by force and threats, to keep him from making his defense, and took judgment by default, well knowing that defendant did not owe him one cent, but that he owed defendant, is a good plea to a Kentucky judgment. *Coffee v. Neely*, 304.

FRAUD—*Continued.*

Judgment of another State, obtained by. See CH. JURISDICTION, 9.
CH. PLEADING, 10. PROCEEDINGS IN REM.

Fraud and duress. See DURESS, 2.

Evidence of. See EVIDENCE, 2, 14.

See TRUST, 4. VENDOR'S LIEN, 12.

FRAUD—STATUTE OF.

1. *Parol sale.* Parol sale of land is not void, but voidable. *Roberts v. Francis*, 128.

2. *Vendor's Lien.* Upon a parol sale of land, executed, a vendor's lien arises. *Ib.*

See SPECIFIC PERFORMANCE, 3, 4. TRUST, 5. VENDOR'S LIEN, 6.

FRAUDULENT CONVEYANCE.

1. *Possession by vendor.* The retention, by the maker of a trust deed, of the possession of a dwelling house conveyed, for a time before foreclosure, is not inconsistent with the terms of a deed of trust to secure the payment of debts. *Farquharson v. McDonald*, 404.

2. *Deed of trust. Reservation or exception. Property exempted.* An exception of such articles as are exempt from execution out of the operation of a deed, does not affect the validity of the deed, further than to prevent the passing of the title to the property of like character with that reserved until the separation of the goods reserved from those conveyed. *Ib.*

3. *Creditor. Plaintiff in tort.* A deed of trust made in contemplation of an action of *tort* and a recovery therein, which provided first for certain preferred debts, and then for the payment of all other creditors and indorsers of the maker, is not fraudulent; for it provides, whether so intended or not, for the recovery in the action of *tort*. *Vance v. Smith*, 343.

4. *Creditor. Plaintiff in tort.* A plaintiff in an action of *tort*, who has not recovered his judgment, is an existing creditor, embraced in a deed providing for the payment of *all* creditors. *Ib.*

5. *Parol proof.* A deed can not be attacked by parol proof, to show that it was intended to delay creditors, for the payment of whom it provides on its face. *Ib.*

6. *Payment of claims.* A strong presumption of the fairness of a deed is raised by the subsequent settlement of the claims, in fraud of which it is charged to be made. *Ib.*

7. *Voluntary conveyance. Provision for payment of debts.* A voluntary conveyance made by a person indebted at the time, but providing for

FRAUDULENT CONVEYANCE—*Continued.*

the payment of all his just debts, and settling the surplus only, is not fraudulent as to subsequent creditors. *Ib.*

8. *Same. Duty to provide for wife.* It is a duty of a husband to provide for a wife, in contemplation of an indefinitely prolonged absence from home. *Ib.*

9. *Fraud. Upon creditors. Who may set up.* If notes are made with intent to defraud creditors, the payor can not set that up as a defense. *Hamilton v. Gilbert*, 680.

GENERAL ASSEMBLY.

See CONSTITUTIONAL LAW.

GRANT.

See CONVEYANCE, 2.

GUARDIAN BOND.

Covers land fund converted before its execution. The sureties of a general guardian are liable on the ordinary bond, for money, proceeds of real estate converted by decree before the execution of the bond. *McClendon v. Harlan*, 337.

Wife guardian. See HUSBAND AND WIFE, 4.

GUARANTY.

Consideration. Holder for value. Want of consideration for a guaranty can not affect the right of an innocent holder for value, without notice. *Stone v. Bond*, 425.

HAND-WRITING.

See EVIDENCE, 15.

HEIR.

- Of a living person. See DEED, 3.

Mother, when heir. See DESCENTS.

HOLDER FOR VALUE.

See GUARANTY.

HUSBAND AND WIFE.

1. *Personalty of wife reduced to possession.* A wife permitting her personalty to go into the hands of her husband, without any stipulation as to investment, has no claim to land purchased with the fund by the husband in his own name. *Jennings v. Jennings*, 283.

See TRUST, 8.

HUSBAND AND WIFE—*Continued.*

2. *Same. Infancy.* If the money is obtained by the husband by a privy examination of the wife during infancy, and she permits it to remain with the husband after she comes of age, and to be used by him, the result will be the same. *Ib.*

Duty of husband to provide for wife. *Vance v. Smith*, 344.

3. *Liability of husband for wife's debts.* By marriage with a female guardian, the husband becomes responsible for all sums for which she is then chargeable, and for all that she becomes liable for during the coverture. *Allen v. McCullough*, 174.

4. *Same. Wife's guardianship.* If she continues to act as guardian during coverture, he is responsible, whether it be proper for her so to continue to act or not. *Ib.*

5. *Same. Divorce does not relieve.* A husband, by divorce, is not relieved from liability for the wife's debts, as in case of the dissolution of the relation by death; but he continues liable, as if the marriage had not terminated. *Ib.*

6. The Code, 2471, preserving "the rights of creditors who became such before the decree of divorce was pronounced," has the effect that the creditors of the husband or husband and wife, who became such at any time during the marriage, are not, by reason of the divorce *a vinculo*, precluded from collecting their debts out of the husband, or out of the wife's property to which his marital rights had attached. *Ib.*

7. *Same.* The husband's liability for the wife's debts does not depend on the amount of her property received by him. *Ib.*

8. *Assumpsit by husband.* If a husband, released by the wife's death from the debt of the wife, assume to pay it, it will create a valid obligation. *Ib.*

INDORSEMENT.

See **BILLS AND NOTES**, 1.

ILLEGALITY.

See **SALE**, 6. **BANK OF TENNESSEE**, 4.

INFANT.

See **HUSBAND AND WIFE**, 2.

Consent order as to. See **CH. PR.**, 8.

INJUNCTION.

See **CH. JUR.**, 5, 7, 8.

IN REM.

See **PROCEEDING IN REM.**

INTEREST.

1. *Usury. Discount of paper made to raise money. Notice.* If a note is made and indorsed to raise money, but is taken at a discount of 20 per cent., without notice of the fact that it is not a real transaction, the discount is not usurious. *Frazer v. Syper*, 340.
2. *Same. Same. Same.* If the holder takes the paper from one who he states he believed was the agent of the *indorser and maker*, that is not evidence of notice. *Ib.*
3. *Same. Discount.* The exchange, for a judgment, of notes at a rate of discount greater than six per cent. per annum, is not usurious, unless made colorably, to evade the usury laws. *Smith v. Price*, 293.
4. *Same. Consideration.* A note for 217.83, and cash, over and above the amount of a judgment, in addition to other notes indorsed to the full amount of the judgment, being given in satisfaction of the judgment, held to be for a valid consideration, and not usurious. *Ib.*
5. *Usury. Compound interest is not.* A note stipulating to pay compound interest is not illegal. *Woods v. Rankin*, 46.
6. *Compound interest. Construction of contract.* A stipulation to pay compound interest on a sum, from a date stated, construed to mean that from that date interest is to commence, and that at the end of each year thereafter, interest for the year will be added to the principal, and that the interest for the next year will be computed on the aggregate principal and interest. *Ib.*
7. *Same. Computation of.* Compound interest, in the absence of any specific designation of the mode, will be held to mean with annual rests. *Ib.*
8. *Conventional interest law. Forfeitures under.* The Act of 1859-60, c. 41, declares that an effort to take more than six per cent. interest for a debt which did not originate for money actually loaned, is unlawful and shall operate as a release of the debtor from the entire amount of such debt, &c. This act, when applied to a note given for principal and usurious interest, computed on a debt, the origin of which was loaned money, does not operate to forfeit the original debt, but only the debt as far as it originates in the usury. The fourth section of the act makes an overcharge of interest only a forfeiture of the excess of interest. *Jackson v. Collins*, 491.
9. *Loan. Without interest. Interest computed from beginning of suit.* A borrower of Confederate notes, on an undertaking to pay after the war, in the currency which should then be in use, without interest, will be charged interest from the commencement of the suit against him. *McCartney v. Wade*, 369.

JOINDER.

Of parties. See CHAMPERTY, 2.

JUDGMENT.

1. *By motion. For insufficient return. Damages.* On motion against an officer for an insufficient return, the 12½ per cent. damages is to be computed on the amount of the execution, after adding the interest thereon to the date of the judgment by motion. *Dunnaway v. Collier*, 10.
2. *Waiver. Release of damages.* Issue of *alias* executions, or receipts of portions of an execution, do not operate as a waiver of the right to move against an officer for an insufficient return on the original execution, nor as a release of the statutory damages. *Ib.*
3. *Satisfied execution.* Where, at the time of the motion, nothing is due on the execution, there is no sum for which to render judgment, or on which to compute damages. *Young v. Donaldson*, 52.
4. *Return on execution. Insufficient. Motion for. Satisfaction.* No judgment by motion will be rendered for a false or insufficient return of an execution upon which the plaintiff has entered satisfaction, in the absence of any proceeding or evidence to attack the entry of satisfaction. *Ib.*
5. *Against purchaser at chancery sale.* Form held irregular not void. *Wiseman v. Bean*, 390.
6. *Several for same debt. One motion against Sheriff.* Where two judgments are rendered for the same debt against different parties, and executions issued, on a motion against a Sheriff for default in returning the executions, the Court will only render one judgment against the Sheriff. *B'k of Tenn. v. Cannon*, 428.
7. *Revenue Collector. Judgment against.* A judgment rendered on motion against a Revenue Collector, and against a part of his living sureties only, is a nullity, and interposes no obstacle to a new proceeding. *Fry v. Britton*, 606.
8. *Of another State. Attacked at law for fraud.* A judgment of another State may be attacked in this State at law by plea, showing that it was obtained by fraud. *Coffee v. Neely*, 304.
 Obtained by fraud. *Rowland v. Jones*, 321.
 When enjoined. See CHANCERY JUR., 7, 8. When not. *Ib.*, 5.
 See COSTS, 3. STAY.
9. *Lien.* If the levy and sale of the land of a debtor is not made within twelve months after judgment, its lien is lost, and a conveyance made while the lien subsists becomes good by relation. *Kelly v. Thompson*, 278.
10. *Lien of.* *Not extended, in time, by the war.* The lien of a judgment obtained in February, 1861, was not extended beyond the time fixed by law, by reason of the war, or by the fact that process could not be is-

JUDGMENT—*Continued.*

sued or executed; but the lien expired in February, 1862, and a sale by the judgment debtor after that time, passed the title free from the creditor's claim. *Smart v. Mason*, 223.

JUDICIAL ACTS.

1. *Liability for. - County Court.* Acts done by defendants as members of a County Court, in a judicial capacity, and without fraud or malice, do not subject them to liability. *Cope v. Ramsey*, 197.
2. *Same. Same.* An order of County Court to an administrator to pay over Confederate funds collected to the Clerk of the Court, and exonerating the Clerk from interest unless he could loan the money, and from loss by depreciation, does not, in the absence of fraud, subject the Justices present to personal liability.

JUDICIAL KNOWLEDGE.

1. *Of laws and statutes of other States.* The courts of Tennessee will, under the Code, 3800, 3801, take judicial notice of the modes of proceeding in Kentucky, as shown in Stanton's Code of Practice, it having been adopted by statute as authentic. *Coffee v. Neely*, 304.
2. *Same.* The same rule would be adopted, independent of the Code. *Ib.*
3. *Coin. Disappearance of, during the war.* The courts will take judicial notice of the fact that during the war, gold and silver disappeared, as a circulating medium, in the Southern States. *Wood v. Cooper*, 441.
4. *Acts of States.* The courts take notice, as part of the history of the country, that Missouri had Representatives in the Provisional Congress of the Confederate States, prior to December, 1861, and was admitted into the Confederacy in December, 1861, and was represented there until the end of the war. *Ib.*
5. *Lines of occupation. Residents of contested States.* The Court cannot judicially know where the fluctuating lines of contending armies were at given dates, nor whether a citizen of Missouri resided within the Federal or Confederate lines on the 19th of December, 1861. *Ib.*
6. *Courts, terms of.* The courts will take judicial notice of the existence of the war, but not of the fact that the courts were closed in a particular county at a given date. *Smart v. Mason*, 223.

See RECORD, 5.

JURISDICTION.

See CHANCERY JURISDICTION. SUPREME COURT. COUNTY COURT. ELECTION, 1. STAY.

JURY.

Franchise law. To exclude a citizen, otherwise qualified, from a jury, because he did not have a certificate as a voter, under the franchise law, was error. *Gunter v. Patton*, 257.

Affidavits of. See NEW TRIAL.

JUSTICE OF THE PEACE.

Proceedings before. Pleading. Non-assignment. In a suit before a Justice of the Peace, the assignee of a promissory note must prove his title to the paper by evidence of the assignments under which he claims it, without a written plea by the defendant denying the assignment. *Stone v. Bond*, 425.

See JUDICIAL ACTS. STAY.

LACHES.

See CHANCERY JURISDICTION, 5, 7, 8. CHANCERY PLEADING, 1.

LEGACY,

See COUNTY COURT, 1. REGISTRATION, 1.

LEGAL TENDER.

See BANK NOTES.

LEGISLATURE.

See CONSTITUTIONAL LAW, 1.

LEVY.

On Remainder. See EXECUTION, 3, 5.

LIEN.

See CHANCERY SALE, 3. JUDGMENT, 9, 10. VENDOR'S LIEN.

LIMITATIONS.

1. *Statute of. Sheriff. Suit on bond of.* The statute of limitations, Code, 2776, bars suits on a Sheriff's bond in ten years from the time the cause of action accrued. *Wiseman v. Bean*, 390.
2. *Same.* Where there is no return of an execution, the statute of three years, Code, 2774, does not apply. *Ib.*
See BOOK DEBT. MISTAKE, 5.

LIS PENDENS.

See VENDOR'S LIEN, 5.

LOST INSTRUMENT.

1. *Affidavit. Who qualified to make.* The affidavit of loss of a bond, under the Code, 3901, 3903, must be made by a person having knowledge of

LOST INSTRUMENT—*Continued.*

the facts. An affidavit made by a person who could, on account of his tender years, have had no knowledge of its execution, is bad. The contents of a lost apprentice bond can not be proved by a Chairman of the County Court, stating that he does not recollect much about the matter, and arriving at the contents from the usual form in such cases. *Cheek v. James*, 170.

2. *Search required to admit secondary proof.* Proof by a Clerk of the Court that since the case was called for trial he had examined the papers in his office, labeled 1851, (the date of the bond,) and did not find the bond, is not proof of a sufficient search to admit secondary evidence. *Ib.*

See EVIDENCE, 20. TAX SALE, 3.

3. *Record. What may be supplied.* Under the Code, 3907, no paper can be supplied unless it has been filed. *Baker v. M. & A. of McMinnville*, 117.

See APPEAL, 5, 6.

MARRIAGE.

See HUSBAND AND WIFE. DIVORCE.

MISSOURI.

See JUDICIAL KNOWLEDGE, 4.

MISTAKE.

1. *Lands sold, not conveyed.* Where lands intended to be conveyed are omitted from a deed, and it turns out that the vendor has no title, the vendee is entitled to recover for the value of the land not conveyed. *Frazier v. Tubb*, 662
2. *Chancery Jurisdiction.* It seems that a Chancery Court is the appropriate jurisdiction to afford this relief, as a recovery of money paid under mistake. If not, the objection must be taken *in limine*, and is waived by answer. *Ib.*
3. *Executor. Personally liable for money paid by mistake.* In such case, an executor who has made the sale is personally liable for the money received, and must look to the estate for his indemnity. That the estate is settled, will not protect him. *Ib.*
4. *Damages. How computed.* The vendees' compensation, where the sale is in gross, is to be fixed by allowing the value of the land lost, estimating it in proportion to the value of the whole land intended to be conveyed. *Ib.*
5. *Vendor and vendee. Possession without title. Stat. Lim.* The vendor is not entitled to be allowed credit for property not conveyed, but of

MISTAKE—Continued.

which possession is delivered by the vendor to the vendee, and held by him until he acquires a possessory title under the Statute of Limitations. *Ib.*

MONEY.

See **BANK NOTES.**

MOTHER.

When heir. See **DESCENTS, 1.**

MOTION.

See **JUDGMENT, 1, 2, 3, 4, 5, 6, 7. SUPREME COURT. PRACTICE.**

To dismiss. See **APPEAL, 7. RECORD, 4.**

NEGLIGENCE.

See **SHERIFF, 2.**

NEW ISSUE.

See **BANK OF TENNESSEE.**

NEW TRIAL.

Affidavits of jurors. Not to be heard. Circuit Judges should not allow affidavits of jurors to be read on applications for a new trial, except in extraordinary cases. *Fish v. Cantrell, 578.*

In Chancery. See **CHANCERY PLEADING, 1, 8, 9.**

NON EST FACTUM.

See **PLEADING, 1.**

NOTE.

See **BILLS AND NOTES.**

NOTICE.

See **BILLS AND NOTES, 1. CHANCERY JURISDICTION, 2. CHANCERY PLEADING, 4. INTEREST, 1. GUARANTY.**

To sue. See **SURETYSHIP, 2.**

NUNCUPATION.

See **WILL, 1, 2, 3.**

OFFICE.

Bond. See **SURETYSHIP, 3.**

ORDER.

1. *Assigned. Protest and notice.* Assignee of an order can not recover on the order against the maker without protest and notice of the refusal of the drawee to accept. *Lancaster v. Arendell*, 434.
2. *Same. Question reserved.* Is an order negotiable? Whether an assignee of an order can sue upon it in his own name, Query? *Ib.*

OYER.

See PLEADING, 5.

PARTITION.

Title. The Chancery Court seems to be an especially appropriate tribunal to determine questions of title preliminary or incident to partition. *Dean v. Snelling*, 484

See COUNTY COURT, 2, 3, 4.

PARTIES.

See CHAMPERTY, 2. CHANCERY PL. AND PR., 1. CHANCERY PR. 1. STATE, 1.

PAUPER.

See APPEAL, 11.

PAYMENT.

See AGENT, 2, 3, 6. CHANCERY SALE, 9. EVIDENCE, 6, 7, 8, 9, 10. TRUST, 3.

In note. See BILLS AND NOTES, 2.

PERFORMANCE.

See CONTRACT, 3.

PETITION.

See CHANCERY PRACTICE, 5.

PLEADING.

Non-assignant. See JUSTICE OF THE PEACE.

1. *Non est factum.* A plea to a bond, that the defendant "did not undertake and covenant," is in substance *non est factum*, and must be sworn to. *State v. Thompson*, 147.
2. *Judgments in County Court.* A plea of a recovery in the County Court of judgments to the amount of the penalty of a bond, which fails to show the nature of the proceedings pending in the County Court, by which it acquired jurisdiction to render judgment, is bad. *Ib.*

PLEADING—*Continued.*

3. *Same.* Such a plea must set out the names of the parties to the judgments or decrees, and conclude with a verification by the record. *Ib.*
4. *Practice.* *Demurrer sustained erroneously to a good plea which is untrue, no error.* Though a plea that the court of another State had no jurisdiction is a good plea, and it is error to sustain a demurrer thereto, yet, if it appear from the record that the Court did have jurisdiction, this Court will not, for such error, reverse a judgment based upon the record. *Coffee v. Neely*, 304.
5. *Oyer.* A demurrer which craves oyer of a note, but does not set it out, does not make it part of the record. *Story v. Dobson*, 29.
6. *Payment. Evidence.* A plea of payment admits the debt, and the *onus* of proof is on the defendant. In the absence of any proof, the plaintiff not reading his notes, judgment must be for the amount of the notes as stated in the declaration. *Bass v. Shurer*, 216.
7. *Confederate Notes.* A plea that a note was given for Confederate money admits the note in like manner. *Ib.*

Joinder of parties in. See CHAMPERTY, 2.

Readiness to perform. See CONTRACT, 3.

Nul tiel record, how tried. See ERROR, 8.

Fraud pleadable at law. See FRAUD, 2, 3, 6. JUDGMENT, 8.

Loose pleading reprehended. *Maupin v. Whitson*, 1.

POSSESSION.

See CHAMPERTY, 1. MISTAKE, 5. CHANCERY SALE, 8.

As evidence of fraud, see FRAUDULENT CONVEYANCE, 1.

POST-OFFICE CHECK.

See CONFEDERATE TREASURY NOTES, 8.

PRACTICE.

Executions. Several at the same time, irregular. The issue of two executions on the same judgment is irregular, but can not affect the liability of Sheriff's acting under the executions. So of an *alias*, without the return of the former execution. *Wiseman v. Bean*, 390

See APPEAL, 7. EVIDENCE, 12, 13. PLEADING, 6.

In contested election. See ELECTION, 3, 4, 5.

PRESUMPTION.

See BILLS AND NOTES, 2. DEED, 1. SURETYSHIP, 1.

PRETENDED TITLE.

See CHAMPERTY, 1.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PROCEEDING *IN REM*.

Fraud. Though a proceeding *in rem*, if fairly conducted, is conclusive against all parties, yet it may be set aside for fraud, as any other decree, judgment, or other judicial proceeding. *Smith v. Harrison*, 230.

PROVOCATION IN SLANDER.

See SLANDER, 2.

PUBLICATION.

See CHANCERY PRACTICE, 3.

PURCHASE MONEY.

Seeing to application. A purchaser from a trustee to sell land mortgaged for payment of debts, is not bound to see to the application of the purchase money. *Loughmiller v. Harris*, 553.

PURCHASER.

See SALE.

RATIFICATION.

Record. Attorney. A ratification of an unauthorized agreement is not proved by the entry of such agreement on the minutes of a court in a cause to which it relates, in the presence of the party's attorney. *Revis v. Wallace*, 658.

See AGENT.

RECORD.

1. *From another State. How certified. Seal.* A record certified under the Clerk's seal of office; if that be not the seal of the Court, and so not in compliance with the Act of Congress; is good under the Code. *Coffee v. Neely*, 304.
2. *Same. Same.* A certificate of a Clerk, that the foregoing contains a true and perfect transcript of certain enumerated papers, (which usually constitute a perfect record,) "as the same remains now in file and of record" in his office, with the certificate of the Judge, that his certificate is in due form of law, is a sufficient authentication of the record. *Ib.*
3. *Signing minutes.* The minutes of a County Court, not signed, have no force. *Johnson v. Johnson*, 521.
4. *Motion proved by action on it.* An entry of record showing that a motion to dismiss a *certiorari* is disposed of, is sufficient to show that the

RECORD—*Continued.*

motion was made, though no entry of the fact appear of record.
Rothchilds v. Forbes, 13.

5. *Entry construed in view of circumstances.* An entry in June, 1865, reciting that the "court being duly organized," in view of the state of things then existing, will be construed to mean, being then first re-organized after the war. *Holcomb v. Canady*, 610.
6. *Appearance. When and for what purpose disputable.* In an action of trespass in which the defendant was not served with process, his father without authority made a compromise, which was signed by the plaintiff alone. This was entered on the minutes: the entry beginning "Came the parties by their *attorney*, and file the following agreement." In a suit brought before this entry was made, by the defendant in that suit against the plaintiff therein, this entry was offered to show a ratification by the present plaintiff of the agreement; held, that he might show by proof that it was made in his absence, and that he had no attorney in that case. *Revis v. Wallace*, 658.

Attacked for fraud. See JUDGMENT, 8. PROCEEDING IN REM. CHANCERY JURISDICTION, 9. CHANCERY PLEADING, 10.

See APPEAL, 2, 3, 4, 5, 6. PLEADING, 3, 4, 5. RATIFICATION. LOST INSTRUMENT, 3. SURETYSHIP, 4, 6. TAX SALE, 3.

REDEMPTION.

Decree to bar. See CHANCERY PRACTICE, 10.

See CONSTITUTIONAL LAW, 2.

REGISTRATION.

1. *Trust deed. Legacy.* An assignment (trust deed) of choses in action, (legacies,) to secure creditors, is good against all persons, without without registration. *Kelly v. Thompson*, 278.
 2. *Form of probate.* A certificate of probate, which does not show that the bargainer acknowledged the execution of the deed *in the presence* of the witness, is cured by the Code, 2080. *Farquharson v. McDonald*, 404.
- See SALE, 4, 5.

RELEASE.

See JUDGMENT, 2. SURETYSHIP, 3, 4, 5, 6.

REM.

See PROCEEDING IN REM.

REMAINDER.

Levy on. See EXECUTION, 3.

REMAND.

See APPEAL, 6. CHANCERY JURISDICTION, 11.

REPUDIATION.

See DEED, 2.

REPUTATION.

See SLANDER, 1.

RESCISSION.

See SALE, 1. MISTAKE, 4.

RESULTING TRUST.

See TRUST, 5, *et seq.*

RETROSPECTIVE CLAUSE.

See BANK OF TENNESSEE, 3.

RETURN.

See JUDGMENT, 1, 2, 4.

REVENUE.

See TAX SALE.

REVENUE COLLECTOR.

See ELECTION, 1. JUDGMENT, 7.

REVIVOR.

See CHANCERY PRACTICE, 6, 7.

RULE IN SHELLEY'S CASE.

See SHELLEY'S CASE.

SALE.

See CHANCERY SALE. EXECUTOR, 1.

Decree for sale. See CH. PR., 9, 10.

By parol. See FRAUD—STATUTE OF. VENDOR'S LIEN, 6. TAX SALE.

1. *Rescission or abatement. Failure of title to material part. What is.*
If the title fail to a part of the land material as an inducement to the purchase, as twenty-five acres, in a tract of one hundred, on which was the only unfailing water on the premises, the vendee has his option to rescind the contract, or to take so much of the land as the vendor can make title to, with an abatement of the price as to that for which the title fails. *Mullins v. Aiken*, 535.

SALE—*Continued.*

2. *Abatement. How estimated.* The abatement will be of the value of the land to which the title fails, estimated relatively to the other parts of the land, at the price agreed upon. *Ib.*
3. *What title purchaser must accept. Estoppel in pais.* An estoppel *in pais*, set up against a clear defect of title, is not a title which a purchaser will be compelled to accept. *Ib.*
4. *Same. Deed not authenticated.* A court will not require a vendee to accept a deed not properly authenticated for registration, as if it be acknowledged, and the certificate fails to show that the Clerk was personally acquainted with the bargainor. *Ib.*
5. *Same. Attachment.* An attachment upon land sold before registration of the debtor's deed, with a decree *pro confesso* against the former holder of the legal title, under whose title the vendor claims, is such a cloud upon the title as will entitle the vendee to rescind. *Ib.*
6. *For illegal purpose.* Knowledge of a purpose to put property to an illegal use, without more; as where a horse was bought to be used in the Confederate service; does not affect the seller with the illegality, so as to bar his right to recover the price. *Tedder v. Odom*, 68.

See PURCHASE MONEY.

SATISFACTION.

See JUDGMENT, 3, 4.

SCHEDULE.

See BANK OF TENNESSEE, 3.

SEAL.

See RECORD, 1.

SET OFF.

Partnership and individual debts not mutual. A debt due from a partnership can not be set off at law against a debt due to a plaintiff, who is a member of the partnership. *Flint v. Tillman*, 202.

See VENDOR'S LIEN, 12.

SHELLY'S CASE.

1. *Rule in. Estates not of same character. Lend.* Where an estate is *lent* to the first taker for life, and then *given* to the heirs of his body, the rule in Shelly's Case does not apply. *Clopton v. Clopton*, 31.
2. *Vested estate. Vendible.* In such case, the legal estate, not being disposed of by the will, vests in the heirs of the donor until the death of the tenant for life; a vested interest, coupled with a possibility

SHELLY'S CASE—*Continued.*

that the whole estate, by the failure of heirs of the life tenant, might vest in them in possession. Such interest is capable of sale, devise or descent. *Ib.*

SHERIFF.

See STATE.

1. *Special deputy.* What is proof of special deputation. Where a negro was sold by A at public sale, and the question was whether A acted as agent for the plaintiff in the execution, or as special deputy sheriff, and the proof showed that he professed in the transaction to act as deputy sheriff, signed the receipt D. S.; that the Sheriff spoke, "as he was bound for it," of going to get the money from A.; agreed with the defendant to apply part of the money realized by A to another debt; that he agreed with another creditor of the same debtor to pay him a debt out of the same fund; these facts were held sufficient to charge the Sheriff for the act of A as his deputy. *Wiseman v. Bean*, 390.
2. *Negligence.* A Sheriff, who gives his receipt for the collection of a debt, becomes an agent for the collection, and is bound to use reasonable diligence. If, in consequence of negligence in obtaining judgment and execution in a reasonable time, the debt is lost, he is personally responsible. *Kinnard v. Willmore*, 619.

Costs of. See COSTS, 1, 2.

See LIMITATIONS, STATUTE OF, 1, 2. SUPREME COURT.

SHERIFF'S SALE.

See EXECUTION, 3.

SIGNATURE.

See CONTRACT, 1, 2. RECORD, 3.

SLANDER.

1. *Reputation of plaintiff.* *Suspicion.* On the trial of an action of slander, for words imputing a want of chastity, on a plea of not guilty, it is not allowable to prove the general reputation and belief of the community, that the house in which the plaintiff resided was a house of ill fame. *Hackett v. Brown*, 264.
2. *Provocation or passion, in mitigation.* In the action of slander, the fact that words are spoken in anger and under provocation, may be looked to in mitigation of damages. *Ib.*

SLAVES.

Passed to distributee, not to administrator. From the passage of the Act of 1827, c. 61, Code, 2246, it was held that the title to slaves vested

SLAVES—Continued.

in the distributees or legatees, and not in the administrator or executor, as it did before that act. *Johnson v. Johnson*, 522.
Emancipation. Time of. *Ib.*

SPECIFIC PERFORMANCE.

1. *Excessive price. Change of circumstances.* A contract for the sale of lands made during the war, and at the factitious prices then prevailing, will not be specifically executed. *Hudson v. King*, 560.
2. *Contract not to be executed in part.* A sale of lands to several persons, heirs or tenants in common, purchasing in unequal amounts, at unreasonable prices, as above, if set aside as to part who resist a specific execution of the contract, will not be enforced against those who insist upon its execution. *Ib.*
3. *Statute of frauds. Plea of.* It seems that, in some cases, specific performance will be refused, where the contract is not reduced to writing, or the writing does not contain a sufficient description of the property sold, though the statute of frauds is not pleaded or relied upon. *Ib.*
4. *Same. Description of land.* A description of lands in a contract of sale, as lots "No. 1, 175 a, 38 p; No. 2," etc., of a certain tract, without other description of the lots, is not a sufficient designation for a Court specifically to execute the contract. *Ib.*

SPECIAL SESSION.

See CONSTITUTIONAL LAW.

STATE OF TENNESSEE.

When a party. Sheriff. District Attorney. A bill filed against the Sheriff and the District Attorney for the State, to enjoin them from collecting a judgment in favor of the State, does not make the State a party, and she can not prosecute a writ of error. *Fry v. Britton*, 606.

STATES.

Record from other. See RECORD. JUDGMENT.
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STAY.

See EXECUTION, 1, 2.

Judgment. Contract. Judgments against sureties for stay can not be supported on the ground of contract only. The Justice must have jurisdiction to render the judgment. *Noel v. Scooby*, 20.

SUBROGATION.

See VENDOR'S LIEN, 10.

SUMMARY PROCEEDINGS.

See JUDGMENT, 1, 7. SURETYSHIP, 3, 4, 5.

SUPREME COURT.

See APPEAL. ERROR.

Jurisdiction. Motion. A motion lies in the Supreme Court against a Sheriff, for failing to return an execution issued from that Court. *Bank of Tennessee v. Cannon*, 428.

SURETYSHIP.

1. *Principal and surety. Presumption. Waiver of vendor's lien.* If a vendee sell lands purchased, and he and his vendee join in notes for a remainder of purchase money to the original vendor, the presumption will be that the second vendee joins as principal, not as surety, and the acceptance of such a note by the original vendor will not raise a presumption of waiver of the lien reserved in a deed. *Hines v. Perkins*, 395.

Surety how far bound by act of principal. See CHANCERY SALE, 7.

2. *Notice to sue.* If a surety to a note notify the holder to sue the principal, when by so doing the money could be made, his failure to sue discharges the surety. *Hopkins v. Spurlock*, 152.

SURETYSHIP—*Continued.*

3. *Sureties. Release of.* Proceedings for the release of sureties are summary in their character, and are not to be extended by construction to embrace cases not provided for by the statutes. *Hickerson v. Price*, 623.
4. *Same. Record. What must appear.* Every fact necessary to authorize the Court to act, must appear by the record. *Ib.*
5. *New bonds. At whose instance to be given.* No provision is made by law for the release of sureties of an officer, by giving new bonds, at the instance of the officer himself. He may give a new bond, on application of a surety, without notice. *Ib.*
6. *Record. Entries at different times.* The record showed a new bond given by a Clerk and Master on his own application. At the next term a surety gave notice, and an entry was made, stating that the former application was made because the Clerk had been informed that the surety desired to be released, wherefore the Court declared that the surety had been released before, and refused the present application. Held, that the surety was not released. *Ib.*

See VENDOR'S LIEN, 10.

TAX SALE.

1. *Assignment. Of tax certificate.* On a bill filed to set up a tax sale, where the records have been lost or destroyed, the certificate of sale given by the Tax Collector, transferred to J. M. Quinby, is no evidence of right in James M. Quinby & Co. *Quinby v. N. A. C. & T. Co.*, 596.
2. *Tax certificate. Sufficiency of description.* A certificate of sale of "eleven tracts of land, containing 23,640 acres, lying in 13th district, White County, sold as the property of Assure Assure," does not sufficiently identify the land, so as to enable the Court to decree title. *Ib.*
3. *Lost record. Proof of contents.* Where a Clerk of a Court, called to prove the contents of a lost record of condemnation of land for taxes, stated that his recollection was that the land was condemned; from the evidence found in the office, he thought the order of sale issued, and that the land was advertised; this was held to be insufficient proof of the contents of the record, to establish a sale. *Ib.*
4. *Tax certificate. Act of 1844, c. 92, s. 1.* The Act of 1844, c. 92, s. 1, giving effect to a sheriff's deed, does not operate to give any special force to a certificate of sale. Such certificate must be accompanied by proof of all the requirements to constitute a valid sale. *Ib.*
5. *Chancery practice. Bill for title. Decree for taxes paid.* A bill for title to land sold for taxes, failing for want of proof of the regularity of the sale, a decree was rendered for taxes paid, with six per cent. interest. *Ib.*

TENANTS IN COMMON.

Re-purchase of joint estate. When not in trust. One of several tenants in common, after the sale of the common estate for taxes, and the expiration of the time for redemption, being allowed to buy or redeem, the purchaser declaring that no one else should be allowed to redeem, and having arranged with him and obtained his deed, she then agreed that any one who would raise the money should have half of the land. The guardian of infant co-tenants undertook to raise the money, but failed to raise anything, and it was paid otherwise, there being no other understanding that the co-tenant should take for any one but herself, it was held that the co-tenants could not require her to share with them the right which she had obtained. *Keele v. Cunningham*, 288.

TENDER.

By whom. The maker of a deed of trust having died, leaving minor heirs, his father, as next friend of the heirs, tendered the money due to the creditor. Held, a good tender to prevent a sale. *Welch v. Greenalge*, 209.

TITLE DEEDS.

Exhibition of See CHANCERY PLEADING, 5, 6.

TREASURY NOTE.

See BANK NOTES, 2.

TRESPASS.

1. *Injuries resulting in death. Right of action. Damages.* Under the Code, 2291, the administrator of a person instantly killed by the act of another, has a right of action, for the use of the wife and children of the deceased, and the damages are to be estimated, not only by the pain and suffering of the deceased, but also by the loss and deprivation occasioned to the wife and children. *N. & C. R. R. Co. v. Prince*, 580.
2. *Same. Evidence.* The character of the deceased as adrunken, worthless man, making no provision for his family, but being a burden to them for his support, is proper matter to be proved in mitigation of damages.

TRUSTS.

1. *Personal liability for investment without security.* A trustee having a fund directed by decree to be laid out in a peculiar mode, finding that investment impracticable, loaned the money during the late war, to solvent parties, without security. Held, that he was liable, upon their insolvency, for the loss. *Wynne v. Warren*, 118.
2. *Failure to give bond. Effect of.* The failure of a trustee to give bond

TRUSTS—*Continued.*

as required by the Code, § 1974; 1856, c. 113, does not affect the validity of the deed. It is merely a ground of removal. *Vance v. Smith*, 344.

3. *Receipt of money by. Not a release of mortgagor or surety.* Neither the maker of a mortgage with a power of sale in a trustee, nor a surety of such maker, is released of the liability to the debt by the fact of a sale and receipt of the money by the trustee, the trustee having applied the money to the payment of other debts by consent of the maker. *Loughmiller v. Harris*, 553.

3a. *Liability of.* The trustee in such case, is liable to a surety upon one of the notes secured by the mortgage, for the amount misapplied, and properly applicable to that note. *Ib.*

4. *Fraud. Evidence.* A trustee can do no act inconsistent with his trust, or injurious to his *cestui que trust*. When a trustee takes a benefit under his abuse of the trust, or non-performance thereof, a fraudulent purpose will be presumed. *Harrison v. Smith*, 230.

5. *Resulting trusts. Kinds of, distinguished.*

1. When one person having the funds of another, invests them without direction of the owner, in property, and takes the title to himself, a trust results.

2. So, when a trustee, having trust funds, agrees with the beneficiary to invest them in real estate, and does so, taking the title to himself.

3. Where funds are in the hands of a trustee, with agreement to invest them in specific property, if that property is purchased, the law raises the presumption that the fund was used, and raises the trust. *Sandford v. Weeden*, 71.

6. *Same. Statute of frauds.* Neither of these is within the prohibition of the statute of frauds. *Ib.*

7. *Same. Quantum of proof.* The proof to raise a resulting trust must be such as to fully satisfy the Court of the facts upon which the result depends. *Ib.*

8. *Same. Husband and wife.* A husband agreeing at the time of a sale of wife's land, to invest proceeds in other lands for her benefit, and making such investment, taking the title in his own name, is held to be a trustee for the wife. *Ib.*

9. *Same. Estoppel.* A failure to set up a resulting trust in a bill for divorce, will not estop a wife from setting it up afterwards. *Ib.*

10. *Same. Creditors of trustee.* The right of the beneficiary in such case, is superior to the right of creditors of the trustee. *Ib.*

11. *Same. Proof to establish.* A resulting trust established upon the following facts: A father being guardian of his son, and indebted to

TRUSTS—*Continued.*

the son, bought the land in dispute for \$3,600, and took the deed to himself, January 2, 1852, declaring to several witnesses that he had invested his son's money, and had bought the land for him. On the 5th of March, 1856, he took a receipt, as guardian, from his son, for \$853.87, purporting to be in full of the amount due the son on settlement, 13th of April, 1850, with interest to date, it being admitted at the bar by all parties that there was no money payment; the settlement referred to being a settlement with the County Court of that date. The son had, previously to the date of the receipt, been put in possession of the land by the father. The father was indebted to the son at the time of the purchase for money actually received, \$1,791, and had appropriated negroes of the son for his own use, by which he was indebted to the son in about \$1,600 more. The father, on the 17th of November, 1861, gave a receipt to the son for all dues and demands, which could only apply to the discharge of the son for the land, and the son gave a receipt in similar form to the father, bearing even date. The father and son both died, and this litigation was between their heirs at law. *Snell v. Elam*, 82.

12. *Same. Strictness of proof. Exception.* The rule which requires strictness of proof to establish a trust may be relaxed in a case of parties who do not deal upon equal terms; as in a case between guardian and ward, where the guardian has kept no accounts, a trust will more readily be presumed. *Ib.*

See TENDER.

USURY.

See INTEREST.

VENDOR.

See SALE. MISTAKE, 5.

VENDOR'S LIEN.

1. *On lands conveyed.* A vendor of lands conveyed is presumed to intend to retain his lien for the purchase money. *Brevard v. Summar*, 97.
2. *Waiver. Note or bond. Personal security.* Taking a note or bond for the price, with the indorsement or security of a third person, is evidence of a waiver of the lien, which requires to be rebutted by proof. *Ib.*
3. *Waiver.* Taking a check or note, not by way of security, but as a mode of payment of the price of land, is not a waiver of the lien, but on failure of payment, the lien may be enforced. A conveyance afterward, and before the non-payment was ascertained, is not a waiver, though the deed recite that the purchase money is paid. *Denny v. Steakly*, 156.

VENDOR'S LIEN—*Continued.*

4. *Double security.* A vendor of one tract having taken in payment a note which was a lien on another tract of land, on non-payment may proceed to enforce his lien on both tracts. *Ib.*
5. *Assignee of. Judgment. Creditor of vendor. Priority between. Lis pendens. Registration.* Summer sold a tract of land, of ninety-seven acres, to Francis, by title bond, lost and never registered, and took notes for the purchase money, two of which he transferred to complainant, Roberts, who filed his bill to enforce the vendor's lien. Alexander, a judgment creditor of Summers, sold the land at execution sale, pending the bill of Roberts, and bought the land. An amended bill brought him before the Court, and he set up his purchase. Held, that the vendor's lien, in the hands of the assignee was to be preferred to the rights of the vendor's creditor purchasing at execution sale, *pendente lite.* *Roberts v. Francis*, 127.
6. *Parol sale.* If the sale was by parol, the heirs of the vendee holding the land and all the other parties but the creditor admitting the sale, or being bound by *pro confesso*, the same result would follow. *Ib.*
7. *Substitution of notes of sub-vendee.* If a vendee of lands, with reservation of lien on the face of the deed, sell to another and procure him to execute notes to the vendor, which are substituted in lieu, not accepted in satisfaction, of the notes of the first vendee, in the absence of express proof of retention of the lien, the presumption will be that the lien is not waived. *Hines v. Perkins*, 395.
8. *Analogous to mortgage.* A reservation of a lien in the deed of conveyance stands on the footing of a mortgage. *Ib.*
9. *Not like implied lien. Priorities.* Such lien reserved, stands on a different footing from the implied lien of a vendor, who has conveyed, and will be superior to conveyances made by the second vendee. *Ib.*
See SURETYSHIP, 1.
10. *Subrogation of surety. Sub-vendee. Assignment of note. Priority.* A vendee of land, with a lien reserved, sold to a sub-vendee a part of the land, and transferred to his vendor notes of his vendee for purchase money, which were entered as credits on his own purchase notes. A surety on notes for the original purchase, who had made payments, was held to have a lien preferred to the lien of the vendor, on the land sold to the sub-vendee. *Carter v. Sims*, 166.
11. Sale of land by deed, reserving a lien; levy on the land by execution, before registration of the deed, as the property of the vendor, and sale and purchase by creditor on the 2nd of April, 1860. He bought and took deed from the vendee on the 8th of March, 1861, and entered upon the land, but took no Sheriff's deed until the 25th of November, 1865. Held, that, as against the lien of the purchase notes in the hands of the assignees of the vendor, though the execu-

VENDOR'S LIEN—Continued.

tion lien was superior, it was waived by the purchase from the vendee. *Hickerson v. Blanton*, 160.

12. The assignees having taken judgment on one note, and being about to take judgment on another, the creditor holding a note on the vendor, due, and two not due, to defeat the assignee from reaching the land by levy, took new notes, and procured the vendor to confess judgment and levied on the land and bought it at auction sale, with the avowed purpose to befriend the vendor and vendee. Held to be a fraud upon the assignees of the purchase notes. *Ib.*

Decree. See CH. PR., 9.

VERDICT.

See ERROR, 3, 4.

VESTED ESTATE.

See SHELLY'S CASE.

VOLUNTARY CONVEYANCE.

See FRAUDULENT CONVEYANCE, 7, 8.

WAIVER.

1. Answer a waiver of objection to jurisdiction in chancery. *Holcomb v. Canady*, 610.
2. Waiver of right to judgment for official default. *Dunnaway v. Collier*, 10; *Young v. Donaldson*, 52.

See JUDGMENT, 2. COUNTY COURT, 3. SURETYSHIP, 1. VENDOR'S LIEN, 1, 2, 3, 11. CH. PLEADING, 7.

WAR.

Lines of occupation. See JUDICIAL KNOWLEDGE, 5. RECORD, 5.

WIFE.

See HUSBAND AND WIFE.

WILL.

See EXECUTOR, 2. CH. JURISDICTION, 9, 10, 11.

1. *Nuncupative*. *Regatio testium*. *Animus testandi*. *Quantum of proof*. A person being on his death-bed, a witness told him he was very sick, and could live but a short time; that "if he had any request to make, or wanted to make any disposition of his property, he ought to make it." The dying man said "he wanted Winton and Sally, (two illegitimates,) to have the land, (which he had previously deeded to

WILL—*Continued.*

- them,) and be made equal to the rest of his children." Held to be no *rogatio testium*, nor sufficient proof of the *animus testandi*. It may as well have been an expression of satisfaction at what was already done, as a new provision. *Smith v. Thurman*, 110.
2. *Same. Construction.* A paper drawn up and presented to the County Court, stated the testamentary words to be, "that he wanted his two children, Winton and Sally, to have the land, and made equal with his other children." Held, that this purported to dispose of nothing but land, and could not be set up as a nuncupative will. *Ib.*
 3. *Same. Evidence. Quantum of proof.* It requires more stringent evidence to prove a nuncupative than a written will. *Ib.*
 4. *Devisavit vel non. Evidence. Declarations of subscribing witness.* On the trial of an issue *devisavit vel non*, the evidence of the declarations of a deceased subscribing witness, that the testator was of unsound mind at the time of the execution of the will, is not admissible in evidence. *Sellers v. Sellers*, 430.
 5. *Same. Same. Petulant reproaches, not admissions. Error.* *must be material.* The petulant reproaches of an old woman, saying her husband "an old fool," and in saying he was deranged, provoked at him, being offered as evidence of admissions of the mental condition of the testator, and excluded, it was held not to be error, on the ground that they ought not to have had, and would not have had, any influence on the verdict. *Ib.*
 6. *Husband and wife. Undue influence.* If a testator has a sound, disposing mind, his will, obtained by his wife in her own favor, without fraud or misrepresentation, but by fair importunity, and by the influence she has acquired by affection and kindness, is a valid testament. This is not undue influence, in the sense of the law. *Smith v. Harrison*, 231.
 7. *Trial by jury. Contest.* Mere injustice or inequality in the disposition of an estate by will, affords no ground for impeaching it. It is the legal right of the citizen to give his estate by will to a stranger to his blood; and the disposition of juries to set aside wills because of an iniquitable disposition of the testator's property, deserves the severe reprobation of the courts. *Ib.*

WITNESS.

See EVIDENCE, 3, 4, 21.

Deceased. See EVIDENCE, 11, 17.

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